April 11, 1984

PRESS RELEASE

FOR IMMEDIATE RELEASE

INSTITUTE OF LAW RESEARCH AND REFORM REPORT #39
DEFENCES TO PROVINCIAL CHARGES

There is at present great uncertainty about the defences available to a person charged with a breach of an Alberta statute or a regulation promulgated under that statute. Provincial statutes vary in the standard of conduct each imposes upon the public from a complete prohibition of the act, for which there can be no defence once the act has been committed and proven, even in the absence of fault, to a statute that provides that no one should be convicted unless the Crown can prove the intent to commit the offence. There is, however, a wide and indefinite middle ground where many statutes do not say clearly which or either of these two standards would apply.

The report recommends that three categories of offences be established under Alberta statutes: offences in which the words of the statute indicate that proof of intent is required; strict liability offences in which, if the prohibited act has been committed, the accused would have a defence that he exercised reasonable care to avoid committing it; and absolute liability offences where no defence is available once the prohibited act has been proven, and the accused could be convicted even if faultless. The Institute recommends that absolute liability offences should rarely, if ever, be enacted by the legislature.

The Institute also recommends that anyone who commits a breach of a provincial statute, other than a statute that

imposes absolute liability, should have a valid defence in three other cases. First, if they relied on what they were told would be lawful by a person of some authority in the appropriate government department that administers the statute; second, if they relied on a court decision that was later overruled; and third, if they were charged under the provisions of a regulation that had not been published at the time the offence was committed.

The same rules would apply to municipal bylaws.

Insanity can be pleaded as a defence to a charge under the Criminal Code of Canada. However, the Institute thinks that insanity should not be a defence to a charge under a provincial statute, largely to protect the accused person from being commited to a mental institution without the protection of other procedures for the mentally incompetant.

The Report also deals with a number of other problems and defences in the area of enforcement of provincial regulatory statutes.

Institute of Law Research and Reform

The Institute of Law Research and Reform began operations 1 January 1968, having been established by the agreement of the Government of Alberta, the Univeristy of Alberta and the Law Society of Alberta. Its objectives are to conduct legal research and to formulate recommendations for the improvement of the law of Alberta.

The Institute has seven full-time counsel on its legal staff. As well, it makes extensive use of research consultants. W.H. Hurlburt, Q.C. the is Director and W.E. Wilson, Q.C. is the Chairman of the Board.

The recommendations of the Institute have led to the enactment, in recent times, by the Government of Alberta of a new Business Corporations Act (effective 1 Fecbruary 1982) and of a Mobile Home Site Tenancies Act (effective 1 January 1983). Currently, the Institute is engaged in several major law reform projects, including Land Titles, Limitation of Actions, Not-for-Profit Corporations, Judicial Review of Administration Action and the family law topics of Representation of Children in Legal Proceedings and Persons Living Together Outside Marriage.

The offices of the Institute are located at 402 Law Centre, University of Alberta, Edmonton, Alberta, T5G 2H5. The telephone number is (403) 432-5291.

Copies of the Institute's Report may be obtained by writing to the following address:

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Copies may be requested by telephone at (403) 432-5291.

INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

DEFENCES TO PROVINCIAL CHARGES

Report No. 39

March, 1984

INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

The members of the Institute's Board of Directors are W.E. Wilson, Q.C. (Chairman); J.W. Beames, Q.C.; W.F. Bowker, Q.C.; George C. Field, Q.C.; Emile Gamache, Q.C.; W.H. Hurlburt, Q.C.; Professor J.C. Levy; D. Blair Mason, Q.C.; Thomas W. Mapp; Professor R.S. Nozick; and R.M. Paton.

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ACKNOWLEDGMENT

The Institute wishes to acknowledge the contributions of Professor James C. Robb of the Faculty of Law, University of Alberta, who prepared extensive discussion materials for the Institute's Board of Directors, attended meetings of the Board and actively participated in its deliberations and was the draftsman of this Report. However, the Institute's Board of Directors assumes sole responsibility for the opinions and recommendations contained in this Report.

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PART I SUMMARY

1. Scope of Report

This report deals with charges of "provincial offences". Provincial offences are offences under "enactments", that is, Alberta statutes, orders in council, regulations and municipal by-laws.

2. Nature of offences

Provincial offences, as well as most offences against federal law, fall into the category of "regulatory" offences, that is, offences created by enactments which regulate individual conduct in the interests of health, convenience, safety, and the general welfare of the public. (True criminal offences are covered by the Criminal Code of Canada and some other federal legislation.)

3. Draft legislation

We attach a draft of amendments to the Summary Convictions Act which would give effect to those of our recommendations which involve changes to the existing law.

4. Categories of Provincial Offences

Regulatory offences fall into three categories. An accused person is not guilty of a "mens rea" offence unless he intended to commit it or was reckless as to whether he committed it or not. An accused person is guilty of an "absolute liability offence" whether or not he intended to commit it. An accused

person is guilty of a "strict liability" offence whether or not he intended to commit it, except that he can avoid conviction if he can prove that he exercised due diligence to avoid committing it or if when he committed it he reasonably believed in a state of facts which if true would have made his conduct innocent.

The three categories should be retained. However, we recommend that legislation prescribe tests to determine which category a provincial offence falls into. One reason is that a person can be convicted of an absolute liability offence without fault, and we think that that result should follow only if the Legislature specifically says that it should. The second reason is that the existing tests are difficult for the citizen to interpret and have caused conflicting court decisions.

We therefore recommend that tests should be established as follows:

(a) "mens rea" offences: an offence is a mens rea offence if the enactment which creates it uses words indicating that "mens rea"--intent to commit the crime or recklessness as to whether or not it is committed--must be proved by the Crown. This intention is expressed by words such as "knowingly", "intentionally", "wilfully" or "without lawful excuse," but there may be other words which carry a similar meaning.

(b) "absolute liability" offences: an offence is a absolute liability offence if the enactment uses words indicating that the accused person is liable to be convicted whatever his state of mind.

(c) "strict liability" offences: an offence is a strict liability offence if the enactment does not indicate whether or not an accused's person's state of mind is to be considered. (A provincial offence will fall into this category unless the Legislature uses words which say it is to be either a mens rea offence or an absolute liaability offence.)

5. Defences

Our recommendations would continue the following defences which are now available:

(a) mens rea offences: lack of mens rea

(b) strict liability offences: due diligence, reasonable mistake of fact.

(c) all offences: defences which negate proof of the guilty act beyond a reasonable doubt.

Our recommendations would create the following new defences to charges of strict liability offences:

(d) Officially induced error: An accused could not be convicted if he honestly and reasonably relies upon:

(i) a statement of the law by an Alberta court which has not been appealed or overruled within the prescribed time for appeal, or

(ii) a statement of the law made by a government official whose duties authorize and permit him to

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make such statements.

(e) unpublished regulations and by-laws: an accused could not be convicted of an offence against a regulation which has not been gazetted or a municipal by-law which has not been filed with the municipal clerk unless

(i) the regulation or by-law specifically provides that before publication an accused may be charged with an offence under it, and

(ii) reasonable steps had been taken to notify affected persons.

Upon a charge of a mens rea offence the Crown would have the burden of proving mens rea beyond a reasonable doubt. It would also have to prove publication or filing under (e) above. In all other cases mentioned above the accused would have the burden of proving the defence on a balance of probability.

Our recommendations would leave the following defences to be developed by the courts without legislation:

(a) accident

(b) automatism

(c) compulsion

(d) any other principle of common law which renders any circumstance an excuse or justification for a provincial offence

(e) necessity

(f) entrapment

(g) impossibility

(h) slightness and technicality of the offence

(i) obedience to authority.

We recommend that insanity not be a defence to a charge of either a strict liability or an absolute liability offence. The defence is of no value to the accused but the Crown may take advantage of it to prove the accused insane.

Our recommendations would also leave for development by the courts the law relating to attempts to commit provincial offences.

PART II DEFENCES TO PROVINCIAL CHARGES

Chapter 1. Introduction

a. Reason for Project

1.1 The Institute has undertaken, at the request of the Attorney General for the Province of Alberta, to study defences available to charges under provincial statutes. Specifically, we were asked to advise as to whether or not a defence of "due diligence" should be available, and to make recommendations with respect to other defences of general application.

b. Law Reform in Other Jurisdictions

1.2 In the course of this study, we have availed ourselves of studies completed by the Saskatchewan Law Reform Commission, and the English Law Commission. Additionally, we have reviewed the provisions of the Model Penal Code which, in the states which have adopted it, represents the only extensive legislative reform on this subject matter.

Chapter 2. Fault in Regulatory Offences

a. Existing Law

(1) Constitutional Background

2.1 Sub-section 92(15) of the Constitution Act 1867 to 1981[1] provides the constitutional authority for provincial statutory offences in the following terms:

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[1] 30 and 31 Vict., c. 3, U.K., as amended.

> "The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

2.2 On the other hand, sub-section 91(27) grants exclusive jurisdiction over criminal law to the Parliament of Canada.[2] The provinces may not, therefore, pass laws with respect to criminal law in the sense of sub-section 91(27),[3] but otherwise the province may properly create offences for the regulation of matters within its legislative jurisdiction.[4] Traditional examples of such legislative jurisdiction are the following: hunting and fishing, the operation of companies within provincial boundaries, motor vehicles, securities, insurance, leases, occupational health and safety, and prevention of pollution. For the purpose of this report we shall refer to offences created by such legislation as regulatory offences.

(2) Distinction Between Criminal and Regulatory Offences

2.3 The importance of the distinction between offences against criminal law in its true sense, and regulatory offences, arises with respect to the degree of fault that is required in order to prove the offence. At common law, proof of a "criminal" offence required proof of both the prohibited act (referred to as the actus reus) and the criminal intent (referred to as the mens rea). The law was summarized by Blackstone in the following

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2 Ibid.

3 O'Grady v. Sparling (1960), 128 C.C.C.1; United Nurses of Alberta v. A.G. for Alberta (1981), 81 C.L.L.C. 14,077.

4 Strasser v. Roberge (1980), 50 C.C.C. (2d) 129.

fashion:

> "To constitute a crime against human laws, there must be first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.[5]

In a criminal case, both elements must be proven by the Crown. The criminal intent would be proven by evidence of either actual intent to achieve the unlawful consequence, or of reckless conduct which brings about the unlawful consequence.

2.4 The distinction between criminal and regulatory offences was discussed in R. v. Prue and Baril by Laskin, C.J.C. who said:

> "I need not repeat the constitutional consideration which I have mentioned earlier and which leads to the same conclusion. Indeed, the inclusion of an offence in the Criminal Code by that very fact must be taken to import mens rea, and there would have to be a clear indication against it before a court would be justified in denying its essentiality. The Criminal Code is a Code of outright prohibitions, distinguishable from regulatory offences created by other kinds of federal legislation. In this last mentioned class, it is understandable that there should be questions raised about the requirement of mens rea."[6]

A similar distinction was made in R. v. City of Sault Ste. Marie by Dickson, J. in the following terms:

> "The distinction between the true offence and the public welfare offence is one of prime importance. Where the offence is criminal,

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[5] Blackstone, Commentaries on the Laws of England, 10th ed., 1787, Vol. 1, at pp. 57-58.

[6] (1979), 46 C.C.C. (2d) 257, p.261.

> the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them."[7]

While the rule with respect to criminal offences is clear, a question has remained as to what degree of intent must be proven in respect of a regulatory offence. No difficulty would exist if the legislation creating the offence stated the degree of intent required. The legislature could, given its constitutional authority, expressly designate the degree of intent for any offence with a range of options open to it:

1. The offence could require proof of criminal intent.
2. The offence could require proof of negligence.
3. The offence could require proof of the prohibited act only, but permit the accused to raise a defence that he was without criminal intent or had not been negligent.
4. The offence could require proof of the prohibited act and not allow any question of intent or negligence to be raised.

However, few statutes are that clear. As Stuart has said:

> "The fact that all crimes in Canada are statutory may suggest that the task of determining what, if any, mens rea is required for the crime in question, is a simple one of statutory construction. This is, of course, far from the truth. There is often considerable confusion as to the interpretation of the word or words defining or hinting at the mens rea or as to whether or not the statutory provision in question is

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7 (1978), 40 C.C.C. (2d) 353 p. 361.

> to be interpreted as requiring mens rea at all. The confusion has been compounded by the failure of the Canadian courts, particularly the Supreme Court of Canada, to sufficiently grapple with the wealth of legal writings on the subject and with the vital issue of policy."[8]

Similarly the English Law Commission noted:

> "One of the major stumbling blocks to the orderly development of English criminal law has been the confusion that has existed for the past 100 years or so over the question whether the language used in the creation of a statutory offence imports full mens rea (intention, knowledge or recklessness), some fault element short of mens rea, that is, negligence, or some form of "absolute" or "strict" liability.[9]
>
> It is at present the responsibility of the courts dealing with many regulatory offences and other doubtful cases to determine whether or not an element of fault is a pre-requisite of culpability, and, if so, what that element is but it is notoriously difficult to predict from past cases containing general observations of the courts what degree of fault will be required for a particular statutory offence which has not in this respect hitherto received judicial elucidation.
>
> "The mischief aimed at by the Act ... the sort of provision it is, in particular whether it is a public welfare provision, and ... the exact language used", are certainly factors to be taken into account, but their relative importance as indicators of the degree of culpability required may vary from case to case, and there is no readily discernible principle to explain this diversity of treatment.
>
> We take the view that it has become essential to certify with precision those

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[8] Stuart, The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence (1972-73) 15 Crim. L.Q. 160.

[9] The term "strict" is used differently in the report. See p. 19.

> areas where the legislature has created offences without a requirement of fault, (offences of strict liability), as well as those areas where fault is a prerequisite of liability only to the extent that the offender must have unreasonably failed to attain an objective standard of conduct (offences of negligence). By this means we seek to further the attainment of certainty in the criminal law."[10]

2.5 As a result, it has been left to the courts to determine what degree of intent or fault is required for a regulatory offence.

(3) Judicial Interpretation of Regulatory Offences

2.6 The courts, in dealing with regulatory offences, had the same range of options open to them as did the legislatures, i.e. from requiring proof of criminal intent, to imposing liability once the prohibited act was proven. The case which set the pattern for judicial interpretation was the English case of Sherras v. DeRutzen.[11] Section 16 of the Licensing Act prohibited the supply of liquor to police officers on duty. On a charge under this section, Wright, J. noted that while there is a presumption that mens rea is an essential ingredient in every offence, there were exceptions to this rule:

> "One is a class of acts which, in the language of Lush, J. in Davies v. Harvey, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty."[12]

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10 Law Commission Working Paper No. 31, General Principles of Mental Element in Crime, pp. 1-2.

11 [1895] 1 Q.B. 918.

12 Ibid., pp. 921-922.

The case established that all that is required is proof of the prohibited act and no question of intent arises.

2.7 The English judicial approach is that offences are of two types: either they are criminal, or they are offences which impose absolute liability in the sense that upon proof of the prohibited act a conviction must follow.[13] This rigid approach leads to the harsh result of convictions in the absence of fault or any intent to commit the offence. It is an inflexible approach in that, insofar as liability to conviction is concerned, it leaves no room to the courts to differentiate among accused - the accused who has actual intent, the accused who is reckless, the accused who brings about the prohibited act through negligence, and the accused who is without fault.

2.8 The first reaction against this approach was by the Australian courts which developed what is often referred to as the 'half-way house' position. The Australian High Court held in Proudman v. Dayman[14] that where an offence did not require proof of criminal intent but only the commission of the prohibited act, it would nevertheless be a defence for the accused to prove that he acted under a reasonable mistake of fact. In that case, the charge was one of permitting an unlicensed person to drive a motor vehicle. Dixon, J. said:

> "It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable

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[13] R. v. Woodrow (1846), 15 M. & W.404; Sweet v. Parsley, [1970] A.C. 132.

[14] (1941), 67 C.L.R. 536.

> grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence."[15]

Later, he said:

> "There may no longer be any presumption that mens rea, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient of an offence created by a modern statute; but to concede that the weakening of the older understanding that the rule of interpretation has left us with no prima facie presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also."[16]

Essentially, Dixon, J. established that in Australian law there would be no conviction if absence of fault was proven.

2.9 In England, the Australian approach was discussed by the House of Lords in Sweet v. Parsley.[17] The accused was a tenant who sub-leased several rooms to tenants. A police raid disclosed the presence of quantities of drugs in the farmhouse. Although not a resident of the house at the time of the raid, the accused was charged with being concerned with the management of premises used for the purposes of smoking cannabis resin contrary to section 5 of the Dangerous Drugs Act. The Law Lords all agreed that the offence was a criminal offence requiring proof of

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15 Ibid., p. 540.

16 Ibid., pp.540-541.

17 Supra, n. 11.

mens rea which had not been proven, and accordingly acquitted the accused. The argument in the case had centered around the issue as to whether or not it was a criminal or regulatory offence. Three of the Lords discussed the situation which would have obtained if they had found the offence to have been a regulatory one. Lords Reid, Pearce and Diplock referred to the Australian "half-way house" approach with approval. They expressed concern with the notion that absolute liability imposes hardship on the morally innocent and thought that only those who have been at least negligent should be convicted. This case did not resolve the issue because the discussion was not necessary for the decision.

2.10 In Canada, the Proudman proposition was accepted in a number of decisions.[18] However, over the course of several years, the Alberta Court of Appeal[19] found it to be inconsistent with decisions of the Supreme Court of Canada in R. v. Pierce Fisheries Ltd.,[20] and R. v. Hill.[21]

2.11 In Pierce Fisheries, the accused company was charged with being in possession of undersized lobsters. The Provincial Magistrate found an absence of proof of mens rea and acquitted the company. The majority judgement of the Supreme Court of Canada was given by Ritchie, J. in the following terms:

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18 R. v. Hickey (1976), 29 C.C.C. (2d) 23; R. v. Larocque (1958), 120 C.C.C. 246; R. v. Servico Ltd. (1977), 2 Alta. L.R. (2d) 388.

19 R. v. Gillis (1974), 18 C.C.C. (2d) 190; R. v. Lambrinoudis (1978), 39 C.C.C. (2d) 12.

20 [1971] S.C.R. 5.

21 [1975] 2 S.C.R. 402.

"Generally speaking, there is a presumption at common law that mens rea is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption. Whether the presumption arises in the latter type of cases is dependent upon the words of the statute creating the offence and the subject matter with which it deals.

In the case of Cundy v. LeCocq, the appellant had been convicted of selling liquor to a person who was drunk, contrary to s. 13 of the Licencing Act, 1872, although he was unaware of the drunkenness. In affirming this conviction, Stephen, J. clearly indicated that in 1884 the presumption of mens rea had already ceased to have general application in statutory offences. At p. 210 he said: 'In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of Regina v. Prince, L.R. 2 C.C.R. 154 and Regina v. Bishop, 5 Q.B.D. 259, to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each act that is under consideration to see whether and how far knowledge is of the essence of the offence created.' The case most frequently cited as illustrating the limits of the presumption that mens rea is an essential ingredient in all offences and the exceptions to it, is Sherras v. DeRutzen, where Wright, J. said, at p. 921: 'There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the Act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered ...'
The learned judge then went on to say '... the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush, J. in Davies v. Harvey, L.R. 9 Q.B. 433, are not criminal in any real sense, but are acts

> which in the public interest are prohibited under a penalty'."[22]

He further stated:

> "If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, health, safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one."[23]

Accordingly, Ritchie, J. found that the offence was one in which lack of knowledge was not a defence. While the Sweet case is referred to in his judgement, Ritchie, J. did not refer to those portions of the judgments which dealt with the Australian position. Therefore, Pierce Fisheries neither approved nor rejected the Australian "half-way house" approach. This left Pierce Fisheries open to two interpretations. Either the court had simply decided that on the facts of the case no valid defence had been raised; or, it had implicitly decided in favour of the English approach that for a regulatory offence proof of the prohibited act is all that is required. Lack of intent or fault would not be a defence. As no clear direction could be obtained from the judgement, this question of interpretation was left

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[22] Supra, n. 20, pp.13-14.

[23] Ibid., p.15.

unresolved until R. v. City of Sault Ste. Marie.[24]

2.12 In Sault Ste. Marie the city was charged with having polluted a river and creek. The city's refuse was being disposed of by an independent contractor whose operational methods led to the pollution. The contractor was convicted and the issue was whether the city was also guilty of the offence.

2.13 In the Provincial Court, the trial judge found that the city had nothing to do with the actual disposal operations which were conducted by employees of the independent contractor. The city was acquitted upon these findings of fact. On appeal, the Ontario County Court found the offence to be one requiring proof of the act only and convicted the city. The Divisional Court of Ontario restored the acquittal on the grounds that the charge required proof of intent to cause the pollution, and the Court of Appeal of Ontario agreed with the Divisional Court.

2.14 Upon further appeal to the Supreme Court of Canada, the court in a unanimous judgment adopted the 'half-way house' approach. The judgment, delivered by Dickson, J. said:

> "The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known,

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[24] Supra, n. 7.

is innccent in the eyes of the law.

> In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.
>
> Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent."[25]

Dickson, J. then examined a number of decisions. He went on to say:

> "The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.
>
> In this doctrine it is not up to the prosecution to prove negligence. Instead it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the

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25 Ibid., pp. 362-363.

> prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only estabish on the balance of probabilities that he has a defence of reasonable care.
>
> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
> (1) offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
> (2) Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
> (3) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault."[26]

With respect to the classification of offences, Dickson, J. said:

> "Offences which are criminal in the true sense fall in the first category. Public welfare offences would, prima facie, be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as 'wilfully', 'with intent', 'knowingly', or 'intentionally' or contained in the statutory provision creating the offence. On the other hand, the

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[26] Ibid., pp. 373-374.

> principle that punishment should in general should not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category."[27]

Because the city had not led evidence directed to due diligence, the Court ordered a new trial.

2.15 Following the decision in Sault Ste. Marie, it is clear that we have four categories of offences in Canada:

1. True criminal offences for which there is a presumption that criminal intent must be proven.
2. Regulatory offences requiring proof of intent because of the presence of certain words in the offence section.
3. Regulatory offences for which defences of due diligence and reasonable mistake of fact are available - to be called strict liability offences.
4. Regulatory offences for which there need only be proof of the prohibited act-to be called absolute offences.

If the subject matter of the offence deals with the public welfare it would be presumed (although not conclusively) to fall within category 3.

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[27] Ibid., p. 374.

(4) The Defence of Due Diligence

2.16 The defence of due diligence was described by Dickson, J. as proof that the accused took all reasonable care, that is, the steps which a reasonable person would take to avoid commission of the prohibited act. It is a concept of negligence. A distinction was drawn by Dickson, J. between statutes which create outright prohibitions (such as criminal offences) and statutes which try to enforce a higher standard of conduct. It is the distinction between "you shall not advertise" and "you shall not advertise in a misleading fashion". The distinction is valid insofar as it reflects the nature of most regulatory offences. But, does the distinction carry us far? In the above example, "you shall not advertise" is an outright prohibition; "you shall not advertise in a misleading fashion" seeks a standard of conduct. A defence of due diligence would be available for the second example, but what about the first? We might say that the defence should not be available because everyone is presumed to know the law and so, if someone advertises at all, no question of negligence arises. But, all that says is that we have difficulty conceiving of facts which would support a defence of due diligence in that situation. The defence would fail. We could, therefore, say that the defence is available but unlikely to succeed. In that sense the distinction is false. Surely the real issue is whether we should ever have the possibility of liability without fault. Should absolute offences be retained at all?

(5) Absolute Offences

2.17 The arguments for and against absolute liability are summarized in Sault Ste. Marie as follows:

> "Various arguments are advanced in justification of absolute liability in public welfare offences. Two predominate. Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precautionary measures beyond what would otherwise be taken, in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. Having regard to both the difficulty of proving mental culpability and the number of petty cases which daily come before the courts, proof of fault is just too great a burden in time and money to place upon the prosecution. To require proof of each person's individual intent would allow almost every violator to escape. This, together with the glut of work entailed in proving mens rea in every case would clutter the dockets and impede adequate enforcement as virtually to nullify the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legisation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.
>
> Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking reasonable precautionary measures, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the

> event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law trial and, however one may downplay it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and mens rea must be proven. The administrative argument has little force. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt. Additionally, it may be noted that s. 198 of the Alberta Highway Traffic Act, R.S.A., 1970, c. 169,[28] provides that upon a person being charged with an offence under this Act, if the judge trying the cases is of the opinion that the offence (a) was committed wholly by accident or by misadventure and without negligence, and (b) could not by the exercise of reasonable care or precaution have been avoided, the judge may dismiss the case. See also s. 230(2) of the Manitoba Highway Traffic Act, R.S.M. 1970, c. H-60, which has a similar effect. In these instances at least, the legislature has indicated that administrative efficiency does not foreclose inquiry as to fault. It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interests of health and safety was minor, $20 or $25; today, it may amount to thousands of dollars and entail the possibility of imprisonment for second conviction. The present case is an example".[29]

2.18 The notion of enforcing a higher standard of care was also discussed in Reynolds v. G.H. Austin & Sons Ltd. Devlin, J. said:

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[28] Now s. 150, Highway Traffic Act, R.S.A. 1980, c. H-7.

[29] Supra, n. 7, pp. 363-364.

> "It may seem, on the face of it, hard that a man should be fined, and, indeed, made subject to imprisonment, for an offence which he did not know that he was committing. But there is no doubt that the legislature has for certain purposes found that hard measure to be necessary in the public interest. The moral justification behind such laws was admirably expressed in a sentence by Dean Roscoe found in his book "The Spirit of the Common Law", at p. 52: see the Law Quarterly Review, Vol. 64, p. 167. "Such statutes", he says, "are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their moral duty in the interest of public health or safety or morals." Thus a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark. Although, in one sense, the citizen is being punished for the sins of others, it can be said that, if he had been more alert to see that the law was observed, the sin might not have been committed. But if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing upon the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man (as plainly it seemed to the justices in this case) to be the useless and unjust infliction of penalty."[30]

2.19 The first argument posed for the imposition of absolute liability is that the protection of social interests requires a higher standard of care and attention. But, as Dickson, J. noted, we have no empirical evidence that absolute liability achieves this objective. Indeed, a study by the English Law Commission suggests the opposite.[31] The Commission reviewed the

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[30] [1951] 2 W.L.R. 135, p. 149.

[31] Law Commission Working Paper No. 30, Strict Liability and the Enforcement of the Factories Act, 1961.

enforcement of the Factories Act which is similar to Canadian occupational health and safety legislation. An objective of the study was to determine whether the existence of absolute liability for offences under the Act secured compliance. The Commission came to the conclusion that a breach of the legislation was regarded by the enforcement branch as initially a matter of advice and persuasion rather than prosecution. It was rare that work site inspections failed to uncover breaches of the law but the enforcement branch recognized that is is virtually impossible to run a business without infringing the strict letter of the law. Describing the system of enforcement as one of "extended cautioning", the Commission found that if a series of visits and letters failed to produce at least some evidence of change on the part of the employers, or if there was an accident revealing a serious breach of the law, a prosecution would be commenced. Most prosecutions were taken against firms who had been put on notice that their operations fell short of the requirements of the law and demonstrated, if not indifference to the legal requirements, at least negligence in complying with them. The Commission concluded:

> "For as formal legal action is in practice taken only against those employers who can be shown to have been at fault, it is clearly difficult to argue that any element of strict liability is necessary to the efficacy of the enforcement system."[32]

2.20 From a practical standpoint it was clear that whether or not the law required it, the concept of fault was used in its enforcement. Practically speaking, enforcement of absolute

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[32] Ibid . p. 24.

liability is not uniform. Conceptually speaking, one must ask the question whether the elimination of a fault requirement creates an impossible rather than a high standard. What higher standard can be demanded than to do all that is reasonably necessary to comply with the law?

2.21 The second argument favouring absolute liability is the "administrative" argument. Given the difficulty of proving intent and the large number of cases before the courts, abandoning absolute liability would result in acquittals and a backlog of cases. Advocates of absolute liability would argue that while citizens free of any moral turpitude could be convicted, a safeguard exists since the Crown could exercise its discretion not to prosecute. Dickson, J. found the "administrative" argument to be weak. He noted that evidence of due diligence can be heard at time of sentence and so, might just as well be led during the trial. Moreover, the English experience is that absolute liability can itself lead to acquittals. The English Law Commission indicated that institution of prosecutions in situations in which the accused is without fault reduces the sympathy of the judges for the particular department's work. The Commission inferred that this may result in an increased number of acquittals. Furthermore, where the judge does not feel that the defendant was at fault he is more likely than not to impose a purely nominal fine or conditional discharge. Such results, rather than serving as a deterrent would be viewed more as a cost of doing business.[33] As the Commission stated:

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[33] Ibid., pp.51-53.

> "The value of deterrence and stigmatization, however, is probably dependent on the presupposition the offender was in some way at fault. This is perhaps the most important practical aspect of the traditional mens rea doctrine. Consequently, if criminal sanctions are to be applied in a real sense in the field of regulatory legislation, the ordinary requirements of criminal liability should also be insisted on. The accused person must always be entitled to the defence that he was in no way at fault. In the context of Factories legislation this would normally be covered by a general defence that all due diligence had been used to secure compliance with the law, as is proposed in the first consultative draft of the new safety, health and welfare legislation."[34]

2.22 If there is any force to the administrative argument it is the difficulty of proving a mental element in regulatory offence cases. But this objection can readily be met by casting the burden of proving the absence of fault upon the accused. Dickson, J. made it clear that the burden is reasonably placed on the accused for he is the only one who will have the means of proof and must establish on a balance of probabilities that he has a defence of reasonable care.[35] It was suggested in earlier decisions that in the case of regulatory offences, only an evidentiary burden should be placed upon the accused, so that if evidence was so led, the ultimate burden would remain with the Crown in accordance with ordinary principles of criminal law.[36] However, we are persuaded by the argument that the operations of the accused are within his knowledge. It would only be in rare situations that the Crown would be in any position to rebut the

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[34] Ibid. p. 60.

[35] Supra, n. 7, p.373.

[36] Burns v. Bidder, [1967] 2.Q.B. 227, p.241; Strict Liability: Reasonable Mistake of Fact (1977-78) 20 Crim.L.Q. 300, p.305 and cases cited therein.

accused's evidence.[37] This being so, it is a fair requirement to place the burden of proving due diligence upon the accused as Dickson, J. did. The burden should be no higher than that which is imposed by other reverse onus clauses, that is, proof upon a balance of probabilities.[38]

2.23 One other question arises. If the law permits the question of the mental element to arise at all, why not permit the accused to avoid liability by negating intent to commit the offence? The answer is the simple one advanced by the Law Reform Commission of Canada:

> ...import a full requirement of mens rea and we entirely alter the nature of the regulatory offence. For, ..., regulatory offences are those which, typically, are committed as much through carelessness as by design. Put it another way, the objective of the law of regulatory offences isn't to prohibit isolated acts of wickedness like murder, rape and robbery: it is to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the need to preserve our environments and husband its resources. In other words, the regulatory offence is basically and typically an offence of negligence."[39]

The key word here is promote. It is not enough that one not intend a certain consequence, rather one must take all reasonable care to avoid it. Given that it is a standard of conduct that we generally wish to regulate, it would not be enough to place a

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[37] Supra, n.7, p.19.

[38] R. v. Appleby, [1972] S.C.R. 303.

[39] Working Paper No. 2, Criminal Law, Strict Liability, 1974, p.32. Their usage of "strict" is in the English sense of "absolute".

burden upon the accused to simply negative intent.

2.24 The third argument posed in favour of absolute liability is that the penalties are usually light and do no real harm. This is the most specious of the arguments. As noted by Dickson, J. in Sault Ste. Marie, an accused will suffer loss of time, legal costs, exposure to the processes of a trial, and the stigma of a conviction. This can have further detrimental effects beyond the immediate penalty - business reputation may suffer or renewal of a licence may be more difficult. In addition, fines under modern statutes are rarely nominal and may amount to thousands of dollars and include the possibility of imprisonment.

2.25 The most telling argument against absolute liability is that there is a revulsion against punishing the morally innocent.[40] We should be hesitant as a society to impose any form of stigma or penalties in the absence of fault. The Law Reform Commission of Canada has said:

> "But is it [absolute liability] unjust? In one sense maybe not: at least not in the way it would be unjust in real crimes where bringing wrongdoers to justice is the aim. For there strict liability would expose a man to condemnation, stigma, shame and punishment which, by reason of his lack of fault, are not his due. In regulatory offences, however, condemnation, stigma, shame and punishment (in the full sense of a penalty deserved by the accused) are out of court. The penalty is not so much a punishment as a disincentive, so we can't object that the defendants are receiving blame or punishment beyond their due. In theory then, no question should arise as imposing unfair or unjust burdens.

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[40] Supra, n.7, p.384.

> Unfortunately, it does in practice. Law, like life, is rarely so clear cut as theorists like to think. For one thing, conviction for regulatory offences may carry a stigma. For another, penalties may be looked upon as more than simple disincentives; they may be thought of as deserved. What is more, the possible penalty allowed by law is frequently imprisonment. According to our estimates it is a legal possibility in over 70% of strict liability offences. So, not surprisingly, the social consequences of conviction and punishment for such offences can be quite severe, including loss of job and loss of reputation. Injustice, then, kept out in theory, can in reality creep back in.
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> But it always was there. For even without imprisonment, the penalties for regulatory offences can be harsh enough. Loss of licence with resulting loss of livelihood, can sometimes be far more severe than imprisonment itself. So, for example, a man convicted without fault of the strict liability driving offence can lose his licence and his job.
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> Quite apart from this, strict liability in the law of regulatory offences is unjust in the second sense considered earlier. For, even with the aim of more deterrence, it still offends against the principle that like persons should be treated alike and different ones differently. To treat alike one who is at fault and one who is not at fault is to disregard an important distinction: the two are not in the same category, nor should the law act as if they were. In doing so, it is unjust.[41]

2.26 In England, the Law Commission was of the view that negligence should be the minimum degree of fault justifying liability.[42] The Commission has put forth the following propositions with respect to regulatory offences:

> "(a) The law should still accord with the ordinary man's conception of what is just; if

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[41] Studies on Strict Liability, 1974, p. 22-23.

[42] Supra, n. 10, p. 15ff.

it falls below this standard, it will be brought into contempt.

(b) Fairness between individuals requires that persons in like circumstances should be treated in the same way, and that persons who are not in similar circumstances should be treated differently. The degree of fault with which a person of normal capacity commits a prohibited act is generally regarded as an important ground for distinguishing from other persons of normal capacity who commit the same act with a different degree of fault.

(c) The social interest in economy of punishment requires that a person should not in general be punished for an offence which he does not know he is committing and which he is powerless to prevent, if only because in such cases the threat of sanctions is generally ineffective as a deterrent in relation to his conduct or the conduct of others."[43]

2.27 Concerns such as those expressed by the Canada Law Reform Commission and the English Law Commission are not merely academic, for similar concerns are being raised in Canadian cases. The possibility that absolute liability may violate principles of fundamental justice has been raised in two British Columbia decisions. The first is R. v. Campagna, a decision of the Provincial Court.[44] The accused had been charged pursuant to sub-section 94.1(2) and (3) of the Motor Vehicle Act with driving a motor vehicle while his license was suspended. The penalty for the offence, which was expressly stated to be one of absolute liability, was a mandatory gaol sentence. The trial judge held it to be contrary to s.7 of the Charter of Rights and Freedoms which reads as follows:

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[43] Ibid, p. 4-5.

[44] (1983), 70 C.C.C.(2d) 236.

> 'Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'[45]

The judge reviewed the judgment of Dickson, J. in Sault Ste. Marie concerning absolute liability offences and concluded that such offences could be justified only if there were minor penalties and absence of fault could be raised on the question of sentence.[46] Neither test could be met by sub-sections 94.1(2) and (3). Thus, while not purporting to strike down all absolute offences, the judge indicated that an offence section with a mandatory serious penalty, could not constitutionally provide for absolute liability.

2.28 The second case is In the Matter of the Reference Re Section 94(2), of the Motor Vehicle Act, R.S.B.C. 1979, c.288, As Amended by the Motor Vehicle Amendment Act, S.B.C., 1982, c.36.[47] Under sub-section 94(2) a person driving while his licence was suspended was liable on first conviction to a minimum $300 fine and to imprisonment for not less than seven days and not more than six months. The offence was expressly stated to be one of absolute liability. The British Columbia Court of Appeal held that it violated section 7 of the Charter.[48] In a unanimous judgement the Court said:

> We must here give consideration to the principles which underly the division of

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45 Supra, n.1.

46 Supra, n. 44, p. 242.

47 (1983), 4 C.C.C. (3d) 243.

48 Ibid.

> offences into the three categories. Dickson J. recognized the existence of two categories, viz. mens rea and absolute liability, but decided that a third, strict liability, should be introduced. His discussion of the distinguishing features of each category makes it clear that the nature of the penalty imposed is important.
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> In the case of s.94(2) what the Legislature has done is declare the offence to be absolute, denying to the accused the opportunity to show that he drove without knowledge that his licence was suspended. The penalty imposed is a mandatory seven days imprisonment. The conclusion can only be that the legislation is inconsistent with the principles stated by Dickson J. and which should be applied in determining into which of the three categories an offence falls.
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> With these considerations in mind the meaning to be given to the phrase "principles of fundamental justice" is that it is not restricted to matters of procedure but extends to substantive law and that the courts are therefore called upon, in construing the provisions of s.7 of the Charter, to have regard to the content of legislation. Applying the reasoning of Mr. Justice Dickson in the *Sault Ste. Marie* case it is our opinion that s.94(2) of the Motor Vehicle Act is inconsistent with the principles of fundamental justice.[49]

It was argued by the Crown that with such a ruling all absolute offences would be of no force and effect. The Court rejected that argument:

> "We accept without hesitation the statement expressed by the justice but do not think it necessarily follows that because of section 7 of the Charter this category of offence can no longer be legislated. To the contrary, there are, and will remain, certain public welfare offences, e.g. air and water pollution offences, where the public interest requires that the offences be absolute liability offences."[50]

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[49] Ibid., pp.10-11.

[50] Ibid., p.12.

2.29 Although neither decision purports to abolish liability offences, the Campagna decision has the clearest result. Absolute liability and mandatory penalties are constitutionally invalid. The Reference decision strikes down the particular section but leaves the door open to other absolute liability offences. The first part of the decision centered on penalties but the second part suggests a subject matter test. The court obviously left it open to themselves to determine whether or not the content of legislation is of sufficient importance to justify absolute liability.[51]

2.30 For our purposes, however, the importance of the above decisions is that although the courts first created the absolute liability offence, at least some courts have real doubts that absolute offences comply with notions of fundamental justice. So do we. The absolute liability offence has numerous defects:

1. It penalizes the morally innocent.
2. It fails to differentiate between different circumstances - that is the accused who is at fault, and the accused who is not.
3. It is based on assumptions that have not been empirically established.
4. The injustice of conviction of the morally innocent may lead to disrespect for the law.

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[51] The question of the validity of reverse onus clauses is being actively litigated. The leading decision is R v. Oakes (1983), 2 C.C.C. (3d) 339, (Ont. C.A.), which is being appealed to the Supreme Court of Canada. Also see R v. Stanger et al (unreported July 5, 1983, Alberta Court of Appeal). Neither decision would seem to affect the type of reverse onus provision that we are advocating - a reverse onus provision which, it must be remembered, was first created by the Supreme Court of Canada.

5. The cost to the citizen affected can be high.

6. In practice, there is usually some evidence of fault anyway.

7. It sets an impossible standard of conduct rather than a high standard.

2.31 We recognize that the Legislature has the constitutional authority to create absolute liability offences, and it may wish to do so. There may be matters affecting the public interest which the Legislature considers to be so serious that it may intend to absolutely prohibit the conduct and for which it does not intend that there shall be any excuse. But we believe for the above reasons that this should be rarely, if ever, done.

b. The Classification of Offences

(1) Retention of the Classification of Offences

2.32 The first question raised here is whether or not we should retain the classification of offences as set out in Sault Ste. Marie: mens rea offences, strict liability offences and absolute liability offences. We shall now deal with these in order:

1. Mens rea offences: An offence of this type would require proof of both the prohibited act and intent to commit the act. As earlier stated, we are convinced that this would not be suitable as the general rule for most regulatory offences because of their nature. Negligence is the conduct to be controlled rather than actual intent or recklessness. However, the mens rea category cannot be abandoned. Words such as "intentionally",

"wilfully", "knowingly" and "without lawful excuse" have for many years imported a requirement of proof of intent, either actual or by evidence of recklessness. These words should not now be given a different meaning. The legislature has control over the creation of mens rea offences. If it chooses to use these words it must be taken to have intended to create a mens rea offence. If it wishes to avoid the creation of such an offence it need not use the words. It is our view that the mens rea category should be retained for those offence sections which contain words that have traditionally meant that proof of intent is required.

The words "without lawful excuse" may pose some difficulty. Pursuant to s. 730 of the Criminal Code[52] the burden of proving an excuse prescribed by law is on the accused. Sub-section 4(1) of the Summary Convictions Act[53] makes this provision applicable to provincial offences.[54] However, it may be that the words "prescribed by law" are a limitation on what is clearly a reverse onus clause.[55] In a number of statutes, the provisions will spell out the exceptions or excuses which are available to an accused. The burden of proving that the accused falls within the prescribed exception or excuse is upon the accused. Where the offence section does not enumerate the exceptions or excuses, the Criminal Code generally places a reverse onus clause within the offence section.[56] In the absence of a reverse onus clause, an

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52 R.S.C. 1970, c. C-34.

53 R.S.A. 1980, c. S-26.

54 R. v. Park Hotel (Sudbury) Ltd., [1966] 2 O.R. 316.

55 R. v. Shelley (1981), 59 C.C.C. (2d) 292.

56 See s. 133 (failing to appear) by way of example.

accused might well have an argument that while the evidentiary burden of raising his excuse would be upon him, the ultimate burden remains with the Crown. This would be in accordance with general principles. We are of the view that where the Legislature wishes to cast the burden of proof upon the accused it should do so directly and follow the example set in the Criminal Code.

2. Strict liability offences: An offence of this type would require proof of the prohibited act. The accused may raise a defence of due diligence by showing that he met a reasonable standard of care to avoid commission of the act or operated under a reasonable mistake of fact. It is our view that this category best reflects the true nature of regulatory offences which seek to punish those who are negligent rather than those who are without fault. We are satisfied that it fulfills principles of fundamental justice by permitting the accused to demonstrate that he acted without fault. It is our view that this category should be the general rule for regulatory offences.

3. Absolute Liability Offences: An offence of this type would require proof of the prohibited act and absence of fault would not be a defence. While we recognize that the Reference case[57] indicated that some absolute liability offences may be valid, and while we recognize the legislature may wish to create such offences, we have severe reservations about this category and believe that it should be the rare exception. In Reynolds v. G.H. Austin and Sons Ltd., Devlin, J. said:

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[57] Supra., n. 47.

> "I think it a safe general principle to follow (I state it negatively since that is sufficient for the purposes of this case), that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence then, in the absence of clear and express words, such punishment is not intended."[58]

It is our view that as a general rule no person should be convicted of an offence in the absence of fault and that provincial offences should be presumed to be strict liability offences unless the express words of the statute state that the offence is one of absolute liability.

2.33 In answer to the question of the Attorney General whether the defence of due diligence should be retained, we make the following recommendations:

Recommendation No. 1

(a) We recommend the preservation of the doctrine of due diligence as defined in the case of R. v. City of Sault Ste. Marie for offences of strict liability.

(b) We recommend that the burden of proving due diligence be upon the accused upon a balance of probabilities.

(2) Determination of the Classification of Offences

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[58] Supra, n. 30 p. 150.

2.34 The next question is whether or not legislation should provide criteria for the classification of offences. As previously noted, the legislature has done little to provide certainty as to the classification of offences, and the courts by default have had to classify them.

2.35 Ambiguity in legislation has thrown the problem of classification to the courts. Sault Ste. Marie attempted to set out guidelines to assist the courts. The presence of words such as "intentionally" or "wilfully" would mean the offence is subject to the presumption of full mens rea. Public welfare offences would be presumed to be strict liability, and absolute offences would be created by words making it clear that guilt followed proof of the prohibited act regardless of fault. Factors such as the overall regulatory pattern of the legislation, subject matter, importance of the penalty, and the precision of the language used are to be primary considerations in determining whether an offence is one of strict or absolute liability.[59]

2.36 Subsequent cases have attempted to classify offences according to these criteria. However, an examination of the cases since Sault Ste. Marie indicates that major problems still exist with respect to the classification issue.[60] In many cases the courts arrive at different results for offences that are either the same or very similar. We will now describe the criteria used by the courts since Sault Ste. Marie.

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[59] Supra., n. 7, p.374.

[60] See Appendix A for an examination of cases. While not intended to be an exhaustive list, it is representative of judicial views with respect to classification of offences.

c. Language of the Statute

2.37 The word "knowingly" indicates a requirement of proof of intent.[61] Similarly, words such as "wilful", "acquiesced", "for the purpose of", "set out, use or employ" have been held to require proof of intent.[62] On the other hand, it was held in Sault Ste. Marie that the words "cause" and "permit" signal an offence of strict liability. Dickson, J. acknowledged that these two words are troublesome as some authorities take the position that the words import mens rea and other authorities that they do not. He preferred the view that the offence was in a strict liability category.[63] The Concise Oxford Dictionary defines "cause" as:

> 1. "What produces an effect; antecedent(s) invariably and unconditionally followed by a certain phenomenon;"[64]

It defines permit as: "give consent or opportunity"[65]

Using our analysis, it would be possible to "cause" something (such as pollution) by negligent acts or omissions. On that basis, "cause" connotes a strict liability offence. "Permit" is more difficult since it connotes a positive act of giving consent or opportunity. Can one give consent or opportunity unless one has actual knowledge? In the context of regulatory offences the

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61 R. v. Kester (1981), 58 C.C.C. (2d) 219; R. v. Sigmund, [1979] 3 W.W.R. 459. R. v. Roy (1981) 57 C.C.C. (2d) 286.

62 R. v. Brown and Ballman, [1982] A.P. 6185-01; R. v. Pogo Farming Ltd. (1981), 56 C.C.C. (2d) 31; R. v. Hefler (1981) 42 N.S.R. (2d) 276.

63 Supra., n. 7, p. 375.

64 7th ed., Clarendon Press, 1982, p. 149.

65 Ibid., p. 764.

answer is yes. Using Sault Ste. Marie as an example, the City by contract delegated the responsibility for refuse disposal. If it made no effort to supervise the standards of the disposal operation, it would permit the contractor to dispose of refuse in a sub-standard manner. Liability would occur precisely because the City made no effort to acquire knowledge of the manner of disposal. We therefore agree with Dickson, J. that these words should signal a strict liability offence.

2.38 Sault Ste. Marie attributed meaning to certain words, ending debate as to their significance. But when other words (not dealt with by Sault Ste. Marie) are used in the legislation, a question as to their meaning can arise. For example, the presence of the imperative word "shall" has been held to connote an absolute offence.[66] Other cases have held that this is not conclusive.[67] Offences are usually couched in mandatory language and, given the conflict among the cases, not much guidance can be obtained from them. This adds somewhat to the confusion as to the category in which a particular offence falls within.

d. Difficulty of Enforcement

2.39 There is conflicting authority as to whether or not difficulty of enforcement (often called the "legislative sieve"

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[66] R. v. Morrison (1979) 31 N.S.R. (2d) 195; R. v. Old Cabin Craft Society, (1980), 12 Alta. L.R. (2d) 197; R. v. E.B. Eddy Forest Products Ltd., [1980] O.D.C.C. 5855-01; R. v. Ornamental Precast Ltd., (1980-81) W.C.B. 471; R. v. Canning (1980), 40 N.S.R. 177; R. v. Kelly Landscape Contractors Ltd., (1980), 30 M.P.L.R. 67; R. v. Gourley, (1980), 4 W.C.B. 129.

[67] R. v. Z-H Paper Products Ltd., (1980), 107 D.L.R. (3d) 163; R. v. Laidlaw Transport Ltd., (1980), 4 M.V.R. 253.

argument) means that the offence is one of absolute liability.[68] While a number of cases deal with the argument,[69] its strongest expression is found in R. v. Pee-Kay Supermarkets Ltd., in which Roach, J.A. of the Ontario Court of Appeal said:

> "By the language used in s. 87(1) of the Liquor Control Act the prohibition is made absolute. Moreover, the very nature of the legislation, namely, the control of traffic in liquor in the Province, is such that the prohibitions which are for the specific purpose of insuring such control must be construed as absolute and the offences thereby created as independent of the intention of the person doing the acts thereby forbidden, otherwise the control would be so loose and ineffective that the very purpose and intent of the act would be defeated. If, on a prosecution for the offences created by the Act, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve."[70]

However, with the half-way house approach, the Crown would not have to prove intent. As was said in R. v. Cummins:

> "I am of the opinion that the legislative sieve test becomes considerably diluted when one considers that the expanded alternative of strict liability does not give rise to positive proof of mens rea on the part of the Crown. The consideration of enforceability of any offences is tempered by

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68 Lim Chin Aik v. R., [1963] A.C. 160; R. v. Chapin [1979] 2 S.C.R. 121.

69 R. v. Ping Yuen, 14 Sask. L.R. 475, p.516; R. v. Hickey (1976), 29 C.C.C. (2d) 23, pp.36-37; R. v. Pierce Fisheries Ltd., (1971), 12 C.R.N.S. 272, p. 286.

70 (1947) 6 C.R.28, pp.36-37.

> the fact that the evidentiary basis for the defence of due diligence or mistake of fact rests upon the accused on a balance of probabilities and in addition by the recognition that varying circumstances require different standards of reasonableness on the part of the reasonable man. The expanded alternative no longer involves the choice between the 'luckless victim' or the 'legislative sieve'. I am of the opinion that the finding of absolute liability should be made only where the legislature clearly so expresses their intention."[71]

Particularly if the burden of proving due diligence is placed upon the accused, the enforceability factor should have little weight, if any, in determining the classification.

e. Subject Matter of the Legislation

2.40 The Sault Ste. Marie case indicated that if an offence invokes the public welfare it should be presumed to be a strict liability offence.[72] But what is the "public welfare" and how do we determine whether an offence falls within it? The problems of using this factor as a guide is summarized in R. v. Cummins by Bellerose, P.C.J., as follows:

> "If one adopts the general test that all public welfare offences are to be regarded as imparting strict liability, a problem arises as to the limitations, if any, to be placed upon the concept of 'public welfare offence'. Limiting public welfare offences as those being concerned with 'public health and safety' or of 'great public concern' admits to an unsatisfactory test in that this basis engenders the problems associated with generalization. The observations of MacDonald, J in R. v. Jollimore (1961), 36 C.R. 300 ...., illustrate this concern when at p. 309 he states:

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71 [1979] 3 W.W.R. 593.

72 Supra., n.7, p.374.

"The process of the declension of mens rea in statutory offences was greatly aided by Sherras v. DeRutzen ..., and the generalization made therein (at p. 922) that one of the classes of exceptions to the presumption of mens rea related to statutes which 'are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty.' It was easy thereafter for judges to bring a statute within this exceptional class and to apply their own views of its social policy so as to reach the frequent conclusion that Parliament must have intended (in the phrase of Schroeder, J.A.) to punish the event and not the intent."

At pp. 310-11 he continues:

"What is happening in Canada as well as in England is that where an enactment has been devoid of reference to such doctrine or to a mental requirement (usually indicated by such words as 'knowingly', 'maliciously', etc.), the courts have inferred an intent of the legislature to punish the prohibited act regardless of the presence or absence of any particular mental element and have done so by assumption from the nature of the public interest affected by the act. In many cases this assumption is inadmissible, for it rests upon the judge's evaluation of the degree of urgency which prompted Parliament to enact the measure. Though some glimpse of this may be afforded by the lightness or gravity of the penalty that circumstance is often unilluminating. The real gravamen of complaint against such judicial assumption of purpose has been well described by Glanville Williams:

"'Every criminal statute is expressed elliptically. It is not possible in drafting to state all the exceptions and qualifications that are intended ... The exemptions belong to the general part of the criminal law, which is implied into specific defences ... Now the law of mens rea belongs to the general part of the law and it is not reasonable to expect Parliament every time it creates a new crime to enact it or even to make references to it.

"'The social purpose of a statute may be looked at in order to determine the type of conduct that Parliament intended to prohibit; *but how can it show an intention to dispense with proof of mens rea*? The question is not

> one of the social purposes of a particular statute but of fundamental criminal policy. The intention to create strict responsibility ought always to be evidenced by the words of a statute, not guessed at from its social purpose.'"[73]

This social purpose test was questioned in Lim Chin Aik v. R. when Lord Evershed said:

> "It is not enough in Their Lordship's opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended.[74]

2.41 The difficulty with this test is the subjective view that different courts might take with respect to similar subject matter. Stuart, for example, questions whether or not the difference in result in R. v. Pierce Fisheries between the Court of Appeal[75] and the Supreme Court of Canada[76] decisions is based on conflicting views as to the social consequences of enforcing the legislation in question.[77] The lower court was concerned that the effect of a ruling of absolute liability would make it "virtually impossible for lobster fishermen to carry out their work without violating the law."[78] In the Supreme Court of Canada, the majority view was that it was of overriding importance to bow to the conservation purpose of "protecting lobster beds from depletion and thus conserving the source of

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73 Supra, n. 71, p. 600-601.

74 Supra., n. 68, p. 165. ("Strict liability" here means what we call "absolute liability".)

75 [1969] 4 C.C.C. 163.

76 Supra., n. 20.

77 Supra., n. 8.

78 Supra ., n. 75, p.169.

supply for an important fishing industry which is of general public interest".[79]

2.42 Other cases have demonstrated a lack of consistency in applying a social purpose test. For example in R. v. Robertson[80] it was held that the fact that the legislation dealt with public safety meant that the offence was one of strict liability; while in R. v. Blackburn it was held that because public safety was not involved, it meant the offence was one of strict liability.

2.43 We are of the view that a "social purpose" test is too vague and uncertain to be a useful method of determining classification of offences. The interests of the public welfare or safety may demand that something be prohibited absolutely. Yet, this should be made clear by the legislation and not left to the uncertainty of the courts assigning relative degrees of importance to the purpose of the legislation.

f. Severity of the Penalty

2.44 One of the arguments in favour of absolute liability is that penalties for regulatory offences are generally nominal and therefore no grave harm is done to the accused. As we previously noted, some penalties are large and may involve gaol and the accused can be hurt by the very fact of the conviction. The severity of the penalty is listed in Sault Ste. Marie as one of the factors in determining whether an offence should be classified as one of absolute liability.

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79 Supra., n. 20, p.6.

80 [1981] 5 W.C.B. 372.

2.45 The problem with this factor is determining the degree of severity of penalty necessary to have an offence classified as strict or absolute liability. For example, in R. v. Trophic Canada[81] the accused was convicted of selling a new drug before the filing of a drug submission. The British Columbia Court of Appeal classified the offence as one of absolute liability, notwithstanding that the offence provided for a procedure by indictment (i.e. a more serious offence than a summary conviction offence) and, under that procedure, fines of up to $5000 and imprisonment for up to three years, or both. The test according to MacFarlane, J.A. was:

> "The maximum penal consequences for first and second offences on summary conviction or on indictment are comparatively light in relation to the serious effects which insufficiently tested drugs may have on the public."[82]

Thus, a judge will have to decide whether the penal consequences are heavy or light, not in themselves but in relation to the effects of breaches of the statute. This seems to be a reversion to the social purpose test and the introduction of subjective elements making it vague and uncertain test.

g. Overall Regulatory Pattern

2.46 Upon occasion a vague test, such as "the legislation aims at maximum control" is used,[83] but normally the courts will look to see if the statute in question has provided a defence of

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[81] R. v. Trophic Canada Ltd., (1980), 57 C.C.C. (2d) 1a.

[82] Ibid., p. 6.

[83] R. v. Kelly Landscape Contractors Ltd., Supra., n. 66.

due diligence for some offences but not others. If that is the pattern, the courts restrict the defence to those offences specified.[84] Similarly, where offences are specifically designated as absolute offences by the statute, other offences are held to be of strict liability.[85] This appears to be the most objective of the criteria used. The cases in which it can be applied are exceptional because the legislature has given indications of its intentions.

h. Resolution of the Classification Problem

2.47 From the citizen's point of view, the unusual and conflicting results of our present classification method are best exemplified by the decision of the Ontario High Court in R. v. Z-H Paper Products Ltd.[86] The subsection in question reads in part as follows:

> 24(1) An employer shall ensure that,
>
> (c) the measures and procedures prescribed by the regulations are carried out in the industrial establishment;
>
> (2) The employer shall appoint one or more competent persons to exercise direction and control over persons employed by him and one such person may be the employer.
>
> (3) An employer shall take every precaution reasonable in the circumstances for the protection of an employee in the industrial establishment, but this provision shall not be applied to affect the strict duty imposed by subsection 1.
>
> (4) Where, in an industrial establishment,

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[84] R. v. Burioski and Chelsey Enterprises Ltd., [1979] B.C.D.C.C. 6065-02.

[85] R. v. Conale (1981), 34 N.B.R. (2d) 334.

[86] Supra., n. 67.

(a) the regulations made under The Department of Labour Act or under The Power Corporation Act are contravened;

the employer shall be deemed to be in contravention of subsection 3.

(5) An employer shall not discharge or discipline or threaten to discharge or discipline an employee because the employee has sought the enforcement of this Act or the regulations or has acted in compliance with this Act or the regulations.

2.48 The decision held that sub-section 24(1) established an offence of strict liability; sub-section 24(3) fell within the ambit of the mens rea designation; and sub-section 24(4) was an absolute liability offence. Obviously, once the case was decided, employers were put upon notice as to the kind of conduct that they are required to maintain in respect of that provision. However, one must have pity for employers prior to the decision trying to determine the extent of their liability or the standard of conduct required of them, for it is doubtful that any lay person could imagine that one section could establish three different levels of liability.

2.49 It is our view that the legislature should intervene in order to establish certainty with respect to classification of provincial offences. It is our view that by statute, provincial offences should be presumed to be strict liability offences unless the express words either import mens rea into the offence; or specifically state the offence is an offence of absolute liability.

Recommendation No. 2

(a) We recommend that as a general rule, the minimum requirement of culpability for provincial offences be conduct amounting to negligence.

(b) We recommend that the Legislature enact legislation providing that provincial offences are offences of strict liability unless the express words import *mens rea* into the offence; or the offence is specifically stated to be one of absolute liability.

Chapter 3. The Charge of Attempt

3.1 There are very few cases involving prosecutions for attempting to commit regulatory offences. However, since it does arise on occasion, we must deal with the difficult question as to the degree to which a mental element must be proven in such prosecutions. In the criminal law context the conventional wisdom is, that in order to prove an attempt, the Crown must establish an actual intention to bring about some unlawful consequence even if it is not the precise illegal consequences for which the accused is charged.[87] The trend in Canada since the *Lajoie* case seems to be that proof of recklessness would be sufficient. This means that the Crown must prove some unlawful object. Mere negligence would not be sufficient.

3.2 However, we have established that for regulatory offences mere negligence must be proven rather than actual intent unless the charge is a *mens rea* offence. Accordingly, while

[87] *Lajoie* v. *R.*, [1974] S.C.R. 399; *R.* v. *Whybrow*, 35 Cr. App. R. 141.

proof of a strict or absolute liability offence might involve simply proving negligence, an attempt to commit the same offence would require proof of intent.

3.3 This anomaly has plagued jurists and academics alike, leading to a surprising amount of debate around this question. The major points of the debate are summarized in excellent fashion by Stuart.[88] At first blush, logic would indicate that the mental element required for an attempt should mirror that required for the completed crime and therefore, there could be negligent or even absolute responsibility attempts. That position appears to have been taken by American law reformers. Subclause 5.01(1)(a) of the Model Penal Code states that it is enough that the person with the criminal design "purposely engages in conduct which would constitute the crime if the intended circumstances were as he believes them to be". A similar concept was adopted by the English Law Commission.[89]

3.4 Other authors have proposed different formulas in order to deal with this problem. Glanville Williams, for example, supports the notion that mens rea is required for proof of an attempt but says that although an attempt requires intention as to consequence, recklessness can be sufficient as to circumstances.[90] An alternative point of view put forward by Williams is, that if something short of the completed crime is to be itself a crime, then the best place for that to be stated is

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[88] Canadian Criminial Law (1982). The Carswell Company Limited.

[89] Working Paper No. 50.

[90] Criminal Law The General Part.

in the specific offence section.[91] Smith in an article proposed a rather complex suggestion to the problem. His viewpoint was that there must be an intention with respect to the penalized consequences and to the circumstances essential to their occurrence. However, the mental element with respect to the purely factual circumstances constituting the offence need merely mirror the mental element required for the completed crime. Therefore it might consist in recklessness, negligence or even absolute liability.[92]

3.5 On the other hand, a number of authors have rejected the notion of broadening the concept of attempt. Marlin strongly argues that to reduce the mental element in respect of attempts is to distort the word attempt. His viewpoint is that linguistically, if one is attempting something, one is trying to achieve that thing. That is, he has it as a goal or aim.[93] Notwithstanding the English Law Commission's viewpoint, the English Parliament appears to have continued with the requirement of proof of actual intention as confirmed by the Criminal Attempts Act.[94]

3.6 Both positions have been argued very strongly by able spokespersons. However we believe that it might throw confusion into the law if we were to establish a radical departure from the law with respect to attempts. As well, it is our view that the

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91 Ibid.

92 [1962] Crim. L. Rev. 135.

93 Attempts and the Criminal Law: Three Problems (1976) 8 Ottawa L. Rev. 517.

94 (1981) U.K., c. 47, s. 1(1).

criminal sanction should be applied with restraint and thus the notion of mens reas for attempts should continue to require proof of intent as demonstrated by actual intent or recklessness. It would still be open to the legislature to provide in the offence section itself that something less than intent must be proven. That is the approach we would prefer, otherwise the law with respect to attempt should remain generally to be developed by the case law.

Recommendation No. 3

> We recommend that the law with respect to attempts to commit provincial offences remain to be developed by the case law unless the Legislature in the specific offence section specifies that something short of the completed crime is to be itself an offence.

Chapter 4. Defences of General Application

a. Introduction

4.1 Over the years, a list of defences which apply to criminal cases has been developed by the common law which is preserved by ss. 7(3) of the Criminal Code.[95] A difficult question that has attracted little academic or judicial attention is which of the defences should apply to strict or absolute liability offences? Even where the subject has been discussed there is disagreement as to what defences should apply.[96] The

[95] R.S.C. 1970 c. C-34.

[96] See: Howard, Strict Reponsibility, London: Sweet and Maxwell, 1963; Hogan, Criminal Liability Without Fault, 1969; Stuart, Supra n. 8; Sayre, Public Welfare Offences (1933), 33 Columbia Law Rev. 55.

defences preserved by ss. 7(3) of the Criminal Code are not necessarily applicable to strict or absolute liability offences because criminal charges require proof of criminal intent. Defences negating intent would be applicable only to those regulatory offences which require proof of intent and not to strict or absolute liability offences. Other defences, however, negate proof of the prohibited act or for policy reasons the accused is held to be either excused from or justified in committing the act. It would be difficult to say that such defences could not apply. As Howard has said:

> "It is the common confusion between defences which deny both actus reus and mens rea and those which deny mens rea only; or alternatively between defences which deny the whole of the mental element in crime and those which deny only part; which has occasioned much uncertainty about the true nature of the doctrine of strict responsibility. Strict responsibility does not deprive the defendant of any defence which denies actus reus, but only of defences which deny mens rea. Each defence raised to a strict responsibility charge should therefore be examined with precision to ascertain what it is that is being argued in relation to the definition of the offence."[97]

4.2 It is necessary, therefore, to examine each of the defences in order to determine whether they could apply to regulatory offences. In the course of the examination we will make recommendations with respect to any changes that we feel are advisable.

(1) Defences in Relation to Proof of the Prohibited Act

4.3 Generally, each offence section of a statute or

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[97] Ibid., p. 191.

regulation sets out an act which is prohibited. Commission of that act leads to liability. The legal requirement for proof of the prohibited act is that the act be voluntary--that is, a willed, conscious movement or omission.[98] By way of example, if a person trips causing his gun to discharge killing an out of season moose, the prohibited act has come about but not as a result of a willed movement. In a legal sense, the prohibited act would not have been committed.

4.4 Laforest has pointed out that this concept is seldom argued in criminal cases since the accused would obviously lack the necessary criminal intent. But, where criminal intent is not an essential ingredient of the offence, the concept is very important.[99]

4.5 A similar analysis is provided by Thompson who has stated:

> "It must follow that the first duty of any court in deciding or whether to acquit a person charged with committing a criminal offence is to determine whether the physical act prohibited by law has occurred.
>
> Glanville Williams, in his textbook, defines a physical act as follows: '(a) A willed movement (or omission). (b) Certain surrounding circumstances (including past facts). (c) Certain consequences.' These are the three branches of the physical act. Each branch has its own importance when analyzing the criminal act."[100]

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[98] The guiding principle flows from the maxim actus non facit reus nisi mens sit rea.

[99] Mens Rea In Hunting Offences (1961-62), 4 Crim. L.Q. 444.

[100] The Criminal Act: An Analysis (1975-76) 18 Crim. L.Q. 72, p. 75-76.

4.6 His view is that any movement which occurs in an unconscious state lacks volition and therefore should not attract criminal liability. Thus, if the initial movement is not a willed or voluntary one, there would be a defence. Examples of such situations would be: automatic reflex responses, staggering or slipping, compulsion by physical force to do an act, sleepwalking, or acts induced by hypnotism.[101]

4.7 Thompson would also include intoxication by alcohol or drugs which renders the mind incapable of conscious movement,[102] notwithstanding that Fauteux, J. has indicated that an unconscious state induced by alcohol or drugs is metaphysically impossible.[103]

4.8 Under our proposed classification of offences, all three types of offences require proof of the prohibited act. Logically, a defence which negates such proof should apply. The defences which appear to us to be applicable are:

1. Accident -- We agree with the analysis that a willed or voluntary act or omission is a requirement for proof of the prohibited act. Accordingly, we believe that evidence of accident negates proof of the prohibited act and should be an available defence. This defence would embrace Thompson's examples of automatic reflex responses, staggering, slipping. In our view, the defence does not require legislative clarification.

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[101] Ibid., pp. 75-77.

[102] Ibid.

[103] R. v. George (1958), 128 C.C.C. 289, p. 302.

2. Automatism -- The requirement of proof of a conscious mind as part of the proof of the prohibited act raises some difficult problems. The courts have had little difficulty deciding that someone who commits an act while sleepwalking or in a hypnotic trance would not be legally conscious, but, what about the person in the midst of an epileptic seizure or a person who has received a massive, emotional blow inducing what psychiatrists call a dissociative state of mind? This latter issue was partially dealt with by the Supreme Court of Canada in R. v. Rabey[104] which defined automatism as:

> "Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious involuntary act where the mind does not go with what is being done."[105]

The court distinguished between an unconscious mind produced as a result of a physical blow to the head and one produced as a result of insanity or emotional shock which would not have affected the reasonable man in a similar fashion. Emotional shock of a minor nature affecting a person simply because of his psychological makeup would have to be brought under the defence of insanity. This would appear to us to be a reasonable distinction. Again, each case is going to be dependent upon its own facts as to whether the defence applies. We are of the view that legislative clarification is not required.

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[104] (1980), 15 C.R. (3d) 225, p. 232.

[105] Ibid. p. 232.

3. Compulsion -- There are two aspects to the defence of compulsion. The first is that if someone is physically forced to do something, it is not a voluntary act. For example, if a person's arm is physically forced by another to make a striking motion, in law that act would not be the act of the first person.

The second aspect deals with the situation in which someone's will has been overborne by threats of violence or imprisonment against himself or members of his immediate family. This aspect is usually termed duress. An example would be a person who is told to strike his wife or he will be shot and so he strikes his wife. The striking is clearly his act, but in law it is not considered to be voluntary.

The defence was clearly defined by the English Criminal Court of Appeal in the case of R. v. Steane[106] in the following fashion:

> "Duress is a matter of defence where a prisoner is forced by fear of violence or imprisonment to do an act which in itself is criminal. If the act is a criminal act, the prisoner may be able to show that he was forced into doing it by violence, actual or threatened, and to save himself from the consequences of that violence. There is very little learning to be found in any of the books or cases on the subject of duress, and it is by no means certain how far the doctrine extends, though we have the authority both of Hale and of Fitzjames Stephen, that, while it does not apply to treason, murder and some other felonies, it does apply to misdemeanors, and offences against these regulations or misdemeanors."

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[106] [1947] 1 All E.R. 814.

Practically, the likelihood of such a defence being raised in a provincial offence case is remote. However, in principle there appears to be no reason to remove it as a defence nor do we believe that it requires legislative clarification.

Recommendation No. 4

We recommend that the defences which would normally negate proof of the commission of the actus reus be available for all provincial offences.

(2) Defences In Relation to Proof of Mens Rea

4.9 The criminal intent to commit an offence is of two kinds. Ordinarily, the intentional or reckless bringing about of the result which the law seeks to prevent establishes mens rea. A person is "reckless" if he is aware that the illegal consequences may flow from his act but proceeds to do the act anyway.[107] This is usually referred to as general intent. The addition of words to the offence section such as "wilfully" or "with intent to" requires proof of specific intent. That is, the person must have been aware at the time of committing the act that the illegal consequence would undoubtedly flow from his act or actually have intended the illegal consequence.[108] The distinction between general and specific intent is well established.[109]

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[107] R. v. Buzzanga and Durocher (1979) 49 C.C.C. (2d) 369.

[108] Ibid.

[109] R. v. George, supra, n. 103.

4.10 Normally, the "defence" in mens rea cases is the absence of either the general or specific intent. There are defences, however, in which the distinction becomes important. It is therefore necessary to examine each of the defences which relate to proof of mens rea to determine when they apply and whether they should be changed in any way. The defences which apply are as follows:

1. Intoxication -- Evidence of intoxication may negative proof of specific intent.[110] With regulatory offences, this could become an issue only if the words of the offence require proof of specific intent. To that extent, intoxication should remain a defence. However, there is a suggestion in the George case that intoxication could cause an unconscious state creating a situation akin to automatism although it would seem to be metaphysically impossible.[111] In that situation, intoxication might be held to be a defence to a strict or absolute liability offence. In our view, regulatory offences seek to control negligent conduct and self-induced intoxication is evidence of negligence. Self-induced intoxication should not be a defence to a strict or absolute liability offence. However, in our view the law adequately prevents this defence being raised and a specific recommendation is not required.

2. Mistake of Fact -- In criminal cases an honest but mistaken belief in a state of facts which, if true, would render the

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[110] Ibid.

[111] Ibid.

accused innocent, is a defence in the sense that it negates proof of mens rea. In Pappajohn v. The Queen the Supreme Court of Canada held that an honest but mistaken belief that a victim was consenting to an act of intercourse was a defence to a charge of rape.[112] The majority decision was that there must be some evidence which conveys a sense of reality to the defence, but it did not go so far as to say that the belief had to be reasonably held.[113] Thus, in criminal cases, the rules with respect to mistake of fact are:

a. There must be an honest belief in a state of facts which would render the accused innocent. The belief need not be reasonably held, although the question of reasonableness may help the trier of fact determine whether the belief was honestly held. Intoxication might be a factor in this determination.

b. Because mistake goes to the question of mens rea the ultimate or persuasive burden remains on the Crown, not the defence. If there is a reasonable doubt, the accused is entitled to an acquittal.

4.11 With respect to regulatory offences, where proof of mens rea is required, honest belief should be a defence. The law should not create an exception to the rules relating to proof of mens rea. If the Legislature does not wish this to be a defence,

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[112] (1980), 52 C.C.C. (2d) 481.

[113] Ibid., p. 485.

it need only avoid the using of words which create a mens rea offence.

4.12 Strict and absolute offences do not involve proof of mens rea and therefore honest belief would not be a defence. However, in Sault Ste. Marie, Dickson, J. held that an honest and reasonably held belief in a mistaken set of facts the truth of which would render the accused innocent is a defence to a charge of a strict liability offence.[114] It would not be a defence to a charge of an absolute liability offence.[115]

4.13 The rules in strict liability offences are:

a. The belief in the mistaken set of facts must not only be honestly held but be reasonably held as well. Thus, there is both a subjective and objective test.

b. The burden of proving the belief is upon the accused upon a balance of probabilities. The rules for strict liability offences are quite different from those for mens rea offences where an honest belief negates proof of the mens rea.[116]

4.14 It is our view that the defence of mistake of fact should be available for strict liability offences and that the burden of proof should be on the accused to prove both an honest and reasonably held belief. Proof of lack of negligence is

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[114] Supra, n. 7; and see R. v. Chapin, [1979] 2 S.C.R. 121.

[115] R. v. Sault Ste. Marie, ibid; and R. v. Hickey (1976), 70 D.L.R. (3d) 689.

[116] Strict Liability: Reasonable Mistake of Fact (1977-78), 20 Crim. L.Q. 300.

necessary to avoid liability. If a person actually believes that a mistaken set of facts exists, and if an ordinary, reasonable person in similar circumstances would believe in the same set of facts, it is difficult to say that the person is negligent. A negligently acquired belief in a mistaken set of facts would obviously prove negligence and establish liability. Thus, the requirement of proof of reasonableness of the belief is sound.[117] With respect to the burden of proof we believe that the defence should be put on the same footing as the defence of due diligence, that is, upon the accused upon a balance of probabilities. The reasoning is the same. The Crown would rarely be in possession of the evidence to prove or disprove the mistake. The evidence would normally be the knowledge of the accused which is evidence peculiar to him.

Recommendation No. 5

> We recommend that for strict liability offences there be a defence of reasonable mistake of fact. The burden of proof should be upon the accused upon a balance of probabilities.

3. Mistake of Law -- As a general rule, in criminal cases mistake of law does not afford a defence to the accused.[118] It is no excuse for the accused to say that he was not aware that his conduct was contrary to law either because of ignorance of the law or misinterpretation of the law.

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[117] Barton, Official Induced Error as a Criminal Defence: A Preliminary Look, (1979-80), 22 Crim. L.Q. 314.

[118] s. 19, Criminal Code of Canada, supra n. 95.

Indeed, the case of R. v. Campbell and Mlynarchuk established that reliance upon a judicial interpretation of the law is not a defence.[119] In that case the accused had relied upon a decision of the Alberta Supreme Court, Trial Division, which had received considerable publicity. Subsequent to the decision, and to the accused's reliance upon it, the decision was overturned by the Appellate Division, which rendered the accused's conduct unlawful.

4.15 The volume of legislation and its complexity has led to criticism of this rule.[120] The rationale for the rule, as expressed in the Campbell case is:

> "It is not a defence, I think, because the first requirement of any system of justice, is that it work efficiently and effectively. If the state of understanding of the law of an accused person is ever to be relevant in criminal proceedings, we would have an absurd proceeding. The issue in a criminal trial would then not be what the accused did, but whether or not the accused had a sufficiently sophisticated understanding of the law to appreciate that what he did offended against the law. There would be a premium, therefore, placed upon ignorance of the law.[121]

4.16 Unfortunately, application of the rule brings about its own absurd results as exemplified by the Campbell case. After the two accused in that case had been convicted, the case upon which they had relied was heard at the Supreme Court of Canada and the acquittal restored. Additionally, a number of judgments have blurred the distinction between mistake of fact

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[119] [1973] 2 W.W.R. 246.

[120] See Barton, supra, n. 117.

[121] supra, n. 119, p. 251.

and mistake of law. It is not uncommon to see the same type of error classified by one judge as mistake of fact, and by another as mistake of law.[122]

4.17 Nevertheless, in the area of regulatory offences (by which we include offences under provincial statute, regulatory orders-in-council and municipal by-laws) there is some value to the rule. Regulatory offences seek to control negligent conduct. It is arguable that if a person is going to carry out some enterprise, he should make an effort to determine the state of the law. Where we differ with the present law, however, is that if a person makes a diligent and reasonable effort to determine the law, and is misled either by a judicial statement of the law or by the government department responsible for enforcement of the law; he should not be held liable for that mistake. It is difficult to say that such a person has been negligent or is morally culpable.

4.18 This type of mistake is often referred to as "officially induced error", and is a notion that has been discussed in two recent decisions. In the case of R. v. MacDonald the Alberta Court of Appeal seemed to discuss the notion of officially induced error in the context of a defence of due diligence.[123] In that case the accused had been charged with trading in securities without a license. The accused was a licenced life insurance and mutual fund salesman. His accountant approached him with a view to obtaining his services as a salesman of investment contracts. The accountant advised him

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[122] Barton, supra, n. 117.

[123] (1983), 42 A.R. 228.

that the Securities Act would not apply. The Provincial Court held that the accused had acted reasonably and so acquitted him. This was upheld by the Court of Queen's Bench. The Alberta Court of Appeal was of the view that the mistake was one of law and did not afford a defence. The court held that the defence of due diligence relates only to the fulfillment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation.[124]

4.19 In R. v. MacDougall, the accused had been charged with driving a motor vehicle while his licence was cancelled.[125] The accused had testified that he was under the impression that he could continue to drive pending some notification from the Department of Motor Vehicles. The Nova Scotia Court of Appeal acquitted him on the basis of officially induced error. That decision was overturned by the Supreme Court of Canada, but on the basis that the evidence did not support the defence. Ritchie, J. said:

> It is not difficult to envisage a situation in which an offence could be committed under mistake of law arising because of, and therefore induced by, 'officially induced error' and if there was evidence in the present case to support such a situation existing it might well be an appropriate vehicle for applying the reasoning adopted by Mr.Justice MacDonald. In the present case, however, there is no evidence that the accused was misled by an error on the part of the Registrar."[126]

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[124] Ibid., p. 230.

[125] (1983), 1 C.C.C. (3d) 65.

[126] Ibid., p. 71.

4.20 The Supreme Court of Canada recognized in McDougall that in certain limited circumstances a defence of officially induced error could apply.[127]

4.21 In the United States, the concept of officially induced error has been incorporated into the American Model Penal Code. Sub-section 2.04(3) reads as follows:

> (3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
>
> (a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
>
> (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.
>
> (4) The defendant must prove a defense arising under Subsection (3) of this Section by a preponderance of evidence.

4.22 The question remains whether there should be such a defence in Alberta. In principle, it would appear to us to be sound. First of all, the notion that in all cases the average

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[127] It should be noted that the MacDonald decision was decided before the MacDougall case. See also R. v. Gruber, [1982] 1 W.W.R. 197 in which the Yukon Territorial Court held that the defence was available although not made out on the facts of the case.

lay person must have a better knowledge of the law than a judge is a rather startling burden to place upon such a person. If a judgment has been rendered on a question of law by an Alberta court, and it has not been appealed within the time limits prescribed by law, surely lay persons are entitled to place some reliance upon that decision. If a subsequent decision conflicts with the decision relied upon, we believe that it would engender more respect for the law if persons suspected of breaching the law were notified of the new state of the law rather than immediately prosecuting them. Once upon notice, they could no longer plead reliance on the incorrect decision.

3.23 Similarly, given the vast array of legislation and regulations in existence, it is not uncommon (and indeed, it is to be hoped for) that persons wishing to become involved in regulated conduct would seek the advice of the specialized government department to determine precisely what is permitted or not permitted. If such advice is sought from a person authorized to give such advice and the advice is honestly and reasonably relied upon, it would be inconsistent to have another government department prosecute for what in effect is reliance upon the advice.

Professor Barton has said of the defence:

> "Where the advice is given by an official who has the job of administering the particular statute, and where the actor relies on this advice and commits what is in fact an offence, even if the agency cannot be estopped does it follow that the actor should not be excused? To do so is not to condone any legality or say that the agency is estopped into a position of illegality, but to recognize that the advice was illegal but excuses the actor because he acted reasonably

> and does not deserve punishment. This could be the explanation of a case like Maclean or Dodsworth. In the latter case a person charged with giving a false answer. In the latter case a person charged with giving a false answer while voting had relied on advice given by the committee of two of the candidates.
>
> Although these two might not be classified as 'officials', the direction to the jury which led to an acquittal was as follows:
>
> 'I do not think you ought to convict a person of a misdemeanor...if he has acted bona fide, and has been guided in his conduct in a matter of law by persons who are conversant with the law'.
>
> 'If it is accepted that fairness dictates that on some occasions people should be excused in this way, the remaining problem is to put reasonable limits on a defence of "officially induced error".
>
> 'In almost all of the cases referred to above, the people who gave the advice were acting in some capacity in the administration of justice. It is for this reason that I have suggested the defence be one of "officially induced error". I can see that it might be possible to find situations, such as in Riddell or Campbell in which the person giving the advice was not acting in an official capacity. A restriction would probably exclude such accused persons from reliance on such advice, and obviate the need to categorize the source of advice as official or otherwise, which procedure might cause as much trouble as does the present categorization of a mistake as one of fact or law."[128]

4.24 We agree with this analysis and accordingly, recommend that honest and reasonable reliance upon official advice should be a defence. As with the defences of due diligence and reasonable mistake of fact, we would place the burden of proof upon the accused on a balance of probabilities.

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[128] Supra, n. 117, pp. 331-332.

Recommendation No. 6

We recommend that legislation should provide for a defence of reasonable mistake of law for strict liability offences. Such legislation should provide the following:

1. Honest and reasonable reliance upon a judicial statement of the law pronounced by an Alberta court's decision, which has not been appealed within the time limits prescribed by law or subsequently overruled should be a defence.

2. Honest and reasonable reliance upon a statement of the law by a government official whose duties permit and authorize him to make such statements should be a defence.

3. The burden of proof of the defence should be upon the accused upon a balance of probabilities.

Recommendation No. 7

We recommend that it be a defence to an offence that a regulation or order-in-council has not been published (in the case of a municipal by-law, that it has not been filed with the municipal clerk) unless the offence is expressly stated to apply before publication and a reasonable effort is made to publicize the offence.

4. Insanity -- Pursuant to s. 16 of the Criminal Code, insanity

is a defence to a criminal charge.[129] Under that section, what must be proven is:

(a) Disease of the mind -- This was defined in Cooper v. R. as meaning any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding self-induced states caused by alcohol or drugs and transitory mental states such as hysteria or concussion.[130]

(b) The disease of the mind must be of such intensity that it renders the accused incapable of appreciating the nature and quality of the act or of knowing that it is wrong.[131] The word "appreciate" means something different from "know". It means being able to estimate and understand the consequences of one's act. For example, a person may know that that he is choking someone but not be aware that this may lead to death.[132] The phrase "knowing it is wrong" means that the accused is incapable of knowing that his act is legally wrong rather than morally wrong.[133]

(c) As well, if the person is suffering from specific delusions as a result of disease of the mind, he is legally insane, provided that the belief in the

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[129] Supra, n. 95.

[130] (1979), 13 C.R. (3d) 97; also see R. v. Kjeldsen (1982), 34 A.R. 576.

[131] Cooper, ibid., p. 117.

[132] Cooper; Kjeldsen; supra, n. 130.

[133] Schwartz v. R. [1977] 1 S.C.R. 673.

delusion if true would render the act innocent.[134]

(d) The presumption is that a person is sane and the burden of proof is upon the person seeking to displace that presumption. The Crown may raise the issue of insanity.[135]

4.25 Normally, the defence of insanity is discussed in the context of capacity to commit a crime. That is, the prohibited act has been committed and in some cases there is every intention to commit the act. However, the law holds that an accused is not legally responsible for acts resulting from disease of the mind.[136] Recently, however, there has been a growing trend to relate insanity directly to the issue of criminal intent. That is, while there is an intention to commit the crime it is not the product of a properly functioning mind capable of appreciating the consequences of his physical acts and therefore negates mens rea.[137] Indeed, Dickson, J. has said that the defence may have no application to absolute liability offences.[138]

4.26 The likelihood of someone raising the defence in the context or regulatory offences is surely a remote one, though it causes us some concern that the Crown could raise the issue. The consequences of a successful insanity defence would involve incarceration at an asylum for the criminally insane and would be

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[134] R. v. Budic (1978), 43 C.C.C. (2d) 419.

[135] R. v. Simpson (1977), 35 C.C.C. (2d) 337.

[136] Cooper, supra, n. 130, p 117.

[137] R. v. Abbey (1982) 68 C.C.C. (2d) 394, p. 120..

[138] R. v. Rabey, supra, n. 104, p. 26.

far harsher than a conviction.[138]

4.27 We are of the view that the policy reasoning behind the defence of insanity is that the public needs to be protected from persons who have a mental abnormality which can exhibit itself through violent behavior. While they are not held responsible for their criminal conduct they are subject to compulsory treatment through a form of incarceration. We are of the firm view that this is not applicable to regulatory offences and that the harsh consequences would be disproportionate to the harm caused by commission of a regulatory offence. If treatment is required, the civil methods are available. Accordingly, we would recommend that the defence of insanity be abolished.

Recommendation No. 8

We recommend that the defence of insanity be abolished for provincial offences.

(3) Defences of Excuse or Justification

4.28 The law under certain circumstances excuses an accused from criminal liability even though there is no doubt that the prohibited act has occurred, and indeed in most cases was clearly intended. For policy reasons (usually, that in similar circumstances the ordinary, reasonable person would act in the same way out of necessity) the courts have held that the accused was justified in acting as he did and therefore is excused from liability. The defences that would seem to be applicable are:

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[138] See Canada Law Reform Commission, Report: Mental Disorder in the Criminal Process, (1976).

1. Necessity--This refers to a situation in which an accused is placed in a position of choosing between two courses - not breaking the law or breaking the law, and averting an evil of such magnitude to the accused or others that is thought to justify the infraction. An example of such a situation arose in the case of Buckoke v. Greater London Council in which Lord Denning said:

> "A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more, for the lights to turn green? If the driver waits for that time, the man's life will be lost."[140]

Lord Denning's conclusion was that the driver should be congratulated rather than prosecuted. Nevertheless, he accepted the Crown's submission that evidence of necessity would go to mitigation of sentence only.

The decision in R. v. Morgentaler[141] has established that necessity is a defence in criminal cases. According to Dickson, J. (who relied upon Kenny's Outlines of Criminal Law) there are three tests which must be met. They are:

a) The evil averted must be a greater evil than the offence committed.

b) It must not have been possible to avert the evil by any other means short of the commission of the offence.

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140 [1971] Ch. D. 855, p. 888.

141 (1975) 20 C.C.C. (2d) 449.

c) Less harm must have been done by commission of the offence than the evil averted.[142]

The defence has been discussed in the context of regulatory offences.[143] It is apparent from the decisions, that the Courts have held that the defence is available to a charge under a regulatory offence, although the evidentiary onus is a difficult one to meet.[144]

There are also two sub-species to the defence of necessity which involve the same principle that it is necessary to commit an offence to avoid some greater harm. Although they will rarely arise in the context of regulatory offences they deserve mention. They are:

(a) Self defence--If an accused has a reasonable apprehension (based on reasonable and probable grounds) that his life (or that of an immediate family member) is in danger; and if the force used was in fact necessary for the preservation of life or safety, it is a defence to a charge.[145] The circumstances in which the defence would arise would probably be limited to wildlife cases. Logically, if the choice is between being killed or maimed by a charging moose, or shooting the moose, there are few who would choose the first

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142 Ibid., p. 73.

143 See Appendix B.

144 See R. v. Kennedy (1972) 7 C.C.C. (2d) 42; R. v. Walker (1979) 48 C.C.C. (2d) 126.

145 R. v. Baxter (1976) 27 C.C.C. (2d) 96; also see, Laforest, Mens Rea In Hunting Offences (1981-82), 4 Crim. L.Q. 444.

option.

(b) Defence of Property--Normally, this defence arises in assault or murder cases where the accused is attempting to evict a trespasser from his home or prevent entry by a trespasser. If reasonable force is used, it is a defence.[146] It is difficult to envision a situation involving a regulatory offence in which this defence might arise.

Should the defences of necessity, self-defence and defence of property be available in this jurisdiction? The English Law Commission has recommended that the defence of necessity not be available for "minor offences."[147] Their rationale for so recommending was that the proper exercise of the Crown's discretion in deciding whether or not to institute proceedings would render the defence unnecessary. That would be small comfort to the individual who has not had the benefit of the exercise of that discretion. In principle, we are of the view that the defences should apply to all three categories of offences. The cases are clear that there is an evidentiary burden on the accused to raise the defence. If the evidence discloses that a greater harm has been averted, it should be a defence. The accused in that situation cannot be said to be morally culpable for the reasonable person would have acted as he did.

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146 R. v. Stanley (1977), 36 C.C.C. (2d) 216; R. v. Crothers (1979), 73 C.C.C. (2d) 27.

147 Working Paper No. 83, Defences of General Application, pp. 26-27.

2. Entrapment--The notion of entrapment involves a situation in which the accused has committed an offence as a result of police pressure. That is, the accused would not have committed the offence but for the pressure placed upon him by police officers (usually undercover agents) or persons acting under the control of the police. In such circumstances, to permit a conviction could bring the administration of justice into disrepute. The leading case on the subject is Amato v. R. in which the Supreme Court of Canada upheld convictions for trafficking in cocaine.[148] Dickson, J. (with three judges concurring) held that assuming the defence of entrapment was available it had not been made out on the facts. Ritchie, J. in a concurring judgment, held that it was an available defence and defined it as follows:

> "In my view it is only where police tactics are such as to leave no room for the formation of independent criminal intent by the accused that the question of entrapment can enter into the determination of his guilt or innocence.[149]

In dissent, Estey, J. (with three judges concurring) held that the defence was available in Canada and that the facts of the case supported the defence. He defined entrapment as follows:

> "The principal elements or characteristics of the defence are that an offence must be instigated, originated or brought about by the police and the accused must be ensnared

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[148] (1982), 69 C.C.C. (2d) 31.

[149] Ibid., p. 40.

> into the commission of that offence by the police conduct; the purpose of the scheme must be to gain evidence for the prosecution of the accused for the very crime which has been so instigated; and the inducement may be but is not limited to deceit, fraud, trickery or reward, and ordinarily but not necessarily will consist of calculated inveigling and persistent importuning. The character of the initiative taken by the police is unaffected by the fact that the law enforcement agency is represented by a member of a police force or an undercover agent, paid or unpaid, but operating under the control of the police. In the result, the scheme so perpetrated must in all the circumstances be so shocking and outrageous as to bring the administration of justice into disrepute. At least one relevant circumstance in examining the character in law of the police conduct, (such as persistent importuning) is whether the law enforcement agency had a reasonable suspicion that the accused would commit the offence without inducement. By itself and without more, the predisposition in fact of the accused is not relevant to the availability of the defence. On the other hand, where the true purpose of the police initiative is to put the enforcement officers in a position to obtain evidence of an offence when committed, absent other circumstances already noted, the concept of entrapment does not arise."[150]

The result of the case is that entrapment is a defence in Canada. However, the basis for it is not clear for Ritchie, J. appears to have related it to the question of mens rea while Estey, J. equates it with abuse of process and would permit a judge to stay the prosecution. This difference is important because if it is a mens rea concept it would apply to only those regulatory offences requiring proof of mens rea, whereas if it relates to abuse of process it would apply to all three categories of regulatory offences. In our view, the defence should apply to regulatory offences and we prefer the view of Estey, J. As with officially

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[150] Ibid., pp. 61-61.

induced error, it would be inconsistent for one arm of government to essentially "manufacture" the commission of an offence and for another to prosecute it. However, we would leave it to the case law to further develop this concept.

3. Impossibility--This defence deals with a situation in which an offence has been committed but the accused is excused because compliance with the law is impossible for reasons beyond his control. From the case law, it appears that it is a valid defence in two situations:

(a) In situations in which,compliance is rendered impossible because of an "act of God" it is a valid defence. The classic case is R. v. Bamber in which the accused was charged with having failed to maintain a highway which he was obliged to do by law.[151] The accused's defence was that, while he acknowledged that he was under the duty, he could not comply because the road had been washed away by the sea. The word "impossible" is not used in the judgment, but it does appear to be conceptually contained within the judgment:

> "Both the road which the defendant with liability to repair, and the land over which it passes, are washed away by the sea. To restore the road, as he is required to do, he must create a part of the earth anew ... All the materials with which a road could have been made had been swept away by an act of God. Under these circumstances can the defendant be liable for not repairing the road? We want an authority for such a proposition; and none has been

[151] (1843), 5 Q.B. 279.

found."[152]

(b) The second sense in which impossibility has been held to be a defence arises in cases where the accused was faced with two laws of equal authority and over the same subject matter. Compliance with one would inevitably mean the other was breached.[153]

It has been held not to be a defence where non-compliance occurs because it is commercially impossible. That is, compliance can be secured only by the expenditure of monies or resources which would be prohibitive. In R. v. Woodrow the accused was charged with selling wine which contained more than 20% of proof spirit.[154] The accused had warned her suppliers not to supply wine over the permitted percentage and she herself did not have the facilities necessary to test the wine. In a business sense it was probably impractical to examine each barrel, nevertheless a conviction was entered.

In our view, if compliance with the law is clearly beyond the control of the accused it should be a defence. The limited nature of the defence would mean that it would arise in very few cases. However, with respect to commercial impossibility we believe that it should not be a

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[152] Ibid, at pp. 453-455; also see R. v. Pioneer Timber Company, [1979] B.C. D.C.C. 5490-06 for a discussion of the defence.

[153] Kokoliades v. Kennedy (1911), 18 C.C.C. 495; Kennedy v. Couillard (1910), 17 C.C.C. 239.

[154] (1896), 153 E.R. 907.

defence except to the extent that there is evidence of due diligence with respect to strict liability offences. Given the state of the case law, we do not believe that legislative clarification is required.

4. De Minimis Non Curat Lex (The law does not concern itself about trifles)--This defence has largely arisen in cases involving charges of possession of minute quantities of a narcotic. The concept involved is that the courts will not take notice of breaches of the law which are based on the slightest, most technical breach. In part, the theory is based on a notion that the evil to be prevented by the offence section has not actually occurred. Just as the courts will not generally notice the fraction of a day, or a fraction of a penny[155] they will not always take notice of a minute, unusable quantity of cannabis resin in a pipe that can only be ascertained by scientific means.[156]

In R. v. Webster the accused was charged with parking in a prohibited area.[157] The area in which the accused parked was in a snow removal area where parking was prohibited but there was no snow on the ground. It was held that the de minimis principle would apply where there are irregularities of very slight consequence and the accused was acquitted.

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[155] Black's Law Dictionary, 4th ed., 1968, p. 482.

[156] R. v. Overvold (1973) 9 C.C.C. (2d) 517; R. v. S. (1976) 17 C.C.C. (2d) 181; R. v. Rippey (1982) 65 C.C.C. (2d) 159; contra R. Babiak and Stefaniuk (1976) 21 C.C.C. (2d) 464.

[157] 10 M.V.R. 310.

In principle, we see no objection to this defence. It is a very limited defence as the cases do not suggest that the courts attempt to determine the importance of the law. Rather, they avoid convicting a person whose breach is so technical that there should probably not have been a prosecution in the first place.

5. Obedience to Authority--This defence arises when a member of an armed force (and perhaps a police force) is ordered to do an act by a superior. The rule is that if the member reasonably believed the order to be lawful but in fact his acts are unlawful, he has a defence.[158] We see no objection to this limited defence and would not alter it by legislation.

Recommendation No. 9

We recommend that any principle of common law that renders any circumstance an excuse or justification for an act continue.

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[158] Williams, Textbook of Criminal Law, Stevens & Sons, 1978.

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March 19, 1984

PART III

LIST OF RECOMMENDATIONS

Recommendation No. 1

(a) We recommend the preservation of the doctrine of due diligence as defined in the case of R. v. City of Sault Ste. Marie for offences of strict liability.

(b) We recommend that the burden of proving due diligence be upon the accused upon a balance of probabilities.

Source: Report, para. 2.33.

Implementation: Draft Act s. 4.

Recommendation No. 2

(a) We recommend that as a general rule, the minimum requirement of culpability for provincial offences be conduct amounting to negligence.

(b) We recommend that the Legislature enact legislation providing that provincial offences are offences of strict liability unless the express words import mens rea into the offence, or unless the offence is specifically stated to be one of absolute liability.

Source: Report, paragraph 2.49.

Implementation: s. 3, 4.

Recommendation No. 3

We recommend that the law with respect to attempts to commit provincial offences remain to be developed by the case law unless the Legislature in the specific offence section specifies that something short of the completed crime is to be itself an offence.

Source: Report, para. 3.6.

Recommendation No. 4

We recommend that the defences which would normally negate proof of the commission of the actus reus be available for all provincial offences.

Source: Report, para. 4.8.

Recommendation No. 5

We recommend that for strict liability offences there be a defence of reasonable mistake of fact. The burden of proof should be upon the accused upon a balance of probabilities.

Source: Report, para. 4.14.

Implementation: Draft Act s. 4.

Recommendation No. 6

We recommend that legislation should provide for a defence of reasonable mistake of law for strict liability offences. Such legislation should provide the following:

(a) Honest and reasonable reliance upon a judicial statement of the law pronounced by an Alberta court which has not been appealed within the time limits prescribed by law should be a defence.

(b) Honest and reasonable reliance upon a statement of the law by a government official whose duties permit and authorize him to make such statements should be a defence.

(c) The burden of proof on the defence should be upon the accused upon a balance of probabilities.

Source: Report para. 4.24.

Implementation: Draft Act s. 4, s. 7.

Recommendation No. 7

We recommend that it be a defence to an offence that a regulation or order-in-council has not been published (in the case of a municipal by-law, that it has not been filed with the municipal clerk) unless the offence is expressly stated to apply before publication and a reasonable effort is made to publicize the offence.

Source: Report para. 4.24.

Implementation: Draft Act s. 6.

Recommendation No. 8

We recommend that the defence of insanity be abolished for

provincial offences.

Source: Report para. 4.27.

Recommendation No. 9

We recommend that any principle of common law that renders any circumstance an excuse or justification for an act continue.

Source: Report, para. 4.28.

Implementation: Draft Act s. 5.

PART IV

PROPOSED LEGISLATION

Short Title

1. This Act may be cited as the Summary Convictions Amendment Act.

Definitions

2.(1) (a) "accused" means a person charged with an offence.

(b) "enactment" means a provincial statute, a regulation, an Order in Council made pursuant to a provincial statute, or a municipal by-law.

(2) "offence" means an offence under an enactment.

(3) "mens rea" has the meaning which it bears at common law.

Intentional Offences

3.(1) Where an enactment prohibits a person from engaging in conduct

(a) knowingly, intentionally, maliciously, wilfully or without lawful excuse, or

(b) otherwise expressly or by implication includes mens rea as an element in the offence,

mens rea is deemed to be an element of the offence.

(2) The prosecution shall

(a) bear the burden of proving the mens rea of the accused; and

(b) discharge the burden of proving the mens rea of the accused by proof beyond a reasonable doubt.

Defence of Reasonable Care and Mistake of Fact

4.(1) Unless an enactment otherwise expressly provides, it is a defence to a charge of an offence that the accused

(a) exercised reasonable care to avoid or prevent the performance of the acts constituting the commission of the offence by him; or

(b) reasonably believed in the existence of facts which if correct would not have constituted the commission of an offence by him.

(2) An accused shall

(a) bear the burden of proving a defence under subsection (1); and

(b) satisfy the burden of proving a defence under subsection (1) by proof on a balance of probabilities.

Common Law Defences

5.(1) Every rule or principle of common law

(a) that renders any circumstance a justification or

excuse for any act or omission, or

(b) if section 3 applies to an offence, that renders any circumstance a defence to an offence under an enactment.

continues in force and effect except insofar as it is altered by or is inconsistent with this or any other act.

Unpublished Regulations

6.(1) This section applies notwithstanding the Regulations Act

(2) Subject to sub-section (3), it is a defence to a charge of an offence that at the time at which the accused committed the offence

(a) under a regulation or Order in Council that the regulation or Order in Council had not been published in the Alberta Gazette; or

(b) under a by-law, that the by-law had not been filed with the municipal clerk.

(3) Subsection 2(a) does not apply if the regulation provides

(a) that before publication an accused may be charged with an offence under it, and

(b) reasonable steps were taken to bring the purport of the regulation or Order in Council to the

attention of an accused likely to be affected by it.

(4) The prosecution shall bear the burden of proving the requirements of subsection 3 beyond a reasonable doubt.

Reasonable Mistake of Law

7.(1) It is a defence to an offence

(a) that the accused made a diligent attempt to ascertain the law relating to the conduct upon which the charge is based, or conduct of the same kind, and

(b) that the accused honestly and reasonably relied upon a statement of the law either

(i) made to him by an official or employee of the government or a municipality acting within the course of his employment and scope of his authority, or

(ii) made by a judge of a Court of Alberta in his judicial capacity provided that no appeal has been filed in respect of such judicial statement within the time limits prescribed by law, and the statement has not been subsequently overruled, at the time it was relied upon, and

(c) that under the law as it was stated in the statement, the conduct would not have constituted

an offence.

(d) An accused shall

(i) bear the burden of proving a defence under this subsection; and

(ii) satisfy the burden of proving a defence under this subsection by proof on a balance of probabilities

Defence of Insanity

8. The defence of insanity is hereby abolished.

Date of Coming Into Force

9. This Act shall come into force and effect upon proclamation of the Act.

APPENDIX A

CHARACTERIZATION OF OFFENCES

See: Report, p. 39, n. 60.

1. Consumer Protection Cases

(a) Absolute Liability

R. v. Burjoski and Chelsey Enterprises Ltd. [1979] B.C.D. C. C. 6065-02 (B.C. Co. Ct.)-charges of trading in securities without proper licensing and without filing a prospectus. The statute made defence of due diligence specifically available for other offences within the Act but not for these specific charges.

R. v. Grottoli (1979), 43 C.C.C. (2d) 158 (Ont. C.A.)-charges of misleading advertising pursuant to s. 5(1) of Food and Drug Act. Due diligence provided for as a defence to other Food and Drugs Act offences but not this specific charge therefore absolute liability.

R. v. Trophic Canada Ltd. (1980), 57 C.C.C. (2d) 1 (B.C. C.A.)-charge of selling a new drug before filing of new drug submission and charge of advertising for sale prior to filing of drug submission contrary. to regulations pursuant to Food and Drug Acts. Court held that the relatively light penalties, the subject matter of the charges, and the fact that the procedures for marketing new drugs were well known led to the

conclusion that absolute liability was intended.

(b) Strict Liability

R. v. Belmont Motors Ltd.; Ritchie Motors Ltd. (1978), 7 B.C.L.R. 225 (B.C. Co. Ct.)-charge of deceptive advertising under Trade Practices Act. The court held that the offence was one of absolute liability but a defence will lie if an absence of a guilty mind can be shown!

R. v. Crookes (1979), 19 A.R. 223 (Alberta S.C.)-charge of unlicensed real estate trading contrary to s. 4(1)(a) of Real Estate Agents Licensing Act.

R. v. Ghilzon(1979), 22 O.R. ((2d)) 756 (Ont. Div. Ct.) -charge of permitting, counselling, and assisting another to practice dentistry while unlicensed contrary to Health Disciplines Act.

Hodges v. Alberta Racing Commission (1982), 32 A.R. 565 (Alberta Q.B.)-treating a horse with proscribed drugs.

R. v. F. Karim and Toronto General Hospital (1980), 51 C.C.C. (2d) 360 (Ont. Div. Ct.)-practicing as a chiropodist contrary to s. 5 of Chiropody Act.

R. v. Molis (1980), 33 N.R. 411 (S.C.C.)-charge of trafficing in a restricted drug contrary to s. 42 (1) of the Food and Drug Act.

R. v. Nussbaumer (1981), 6 W.C.B. 390 (B.C. Co. Ct.) -withholding security deposit contrary to s. 78(1) of the Residential Tenancy Act.

R. v. Richardson (1981), 57 C.C.C. (2d) 362 (Ont. H.C.)-charge of unlawfully trading in securities contrary to s. 137(1)(c) of the Securities Act. Existence of onerous penalties and absence of specific language indicated strict liability.

R. v. Perlich Brothers Auction Market Ltd. and Verhoeven (1979), 10 Alta. L.R. ((2d)) 354 (Alberta Prov. Ct.)-selling of diseased cattle pursuant to Livestock Diseases Act.

R. v. Charter Ways Transportation Ltd. (unreported decision dated May 25, 1981) (S.C. Ont.)-charge of bidrigging contrary to s. 33.2(2) of Combines Investigation Act.

R. v. Consumers Distributing Company Ltd., [1980] O. D. C. C. 5185-02 (Ont. C.A.)-charge of false advertising pursuant to s. 36(1)(a) of Combines Investigation Act. Statutory defence of due diligence narrower than common law test of due diligence, but statutory defence governs.

R. v. Travel Ways School Transit Ltd. (1981), 52 C.C.C. (2d) 399 (Ont. C.A.)-bidrigging pursuant to s. 32.2 of Combines Investigation Act.

(c) Requiring Proof of Mens Rea

R. v. Kester (1981), 58 C.C.C. (2d) 219 (Ont. Div. Ct.)-charge arising under s. 17(2) of the Ontario Business Practices Act respecting the engaging in unfair practice of advertisement misrepresentation "Knowing it to be an unfair practice". Use of the word "knowing" converts the offence into one requiring proof of mens rea.

Babka v. Gauthier (1981), 5 W.C.B. 417 (Ont. Dist. Ct.)-charge of unlawfully taking possession of rented premises.

2. Fishing Cases

(a) Absolute Liability

No cases since case of R. v. Sault Ste. Marie.

(b) Strict Liability

R. v. Dowler, [1980] B.C.D. C. C. 5490-04 (B.C. Co. Ct.)-charge of failing to display validation tabs contrary to Regulation 4(1)(c) of Pacific Fishery Regulations and Licensing Regulations.

R. v. Hill, [1979] 3 W.C.B. 213 (B.C. Co. Ct.)-fishing in a prohibited place contrary to s. 19 of Fisheries Act.

R. v. Huson, [1979] 3 W.C.B. 371 (B.C. Co. Ct.)-fishing in a prohibited place contrary to s. 19 Fisheries Act.

R. v. Richmond Plywood Corporation Ltd., [1981] B.C.D. C. C. 5490-L5 (B.C. Co. Ct.)-charge of carrying on a work resulting in harm to a fish habitat, contrary to s. 31(1) Fisheries Act.

(c) Requiring Proof of Mens Rea

R. v. Sigmund, [1979] 3 W.W.R. 459 (B.C. C.A.)-charge of knowingly having in possession halibut below permitted size contrary to s. 7 North Pacific Halibut Fisheries Convention Act. Presence of word "knowingly" requires proof of knowledge.

3. Hunting Cases

(a) Absolute Liability

R. v. Jack and Charlie (1980), 50 C.C.C. (2d) 337 (B.C. P. C.)-unlawfully hunting wildlife out of season.

R. v. Kelbratowski, [1981] 5 W.C.B. 154 (N.S. Co. Ct.)-charge of possession of uncased rifle contrary to s. 123(2) of Lands and Forests Act.

R. v. Morrison (1979), 31 N.S.R. (2d) 195 (N.S.C.A.)-charge of possession of rifle in forest at night when uncased, contrary to s. 123(2) Lands and Forests Act.

R. v. Lambrinoudis (1978), 5 Alta. L.R. (2d) 180

(Alberta C.A.)-failure to affix correct tag. Indicia of absolute liability were that the penalty was not serious and the subject matter was one designed for protection of a natural resource.

R. v. Old Cabin Craft Society (1980), 12 Alta. L.R. (2d) 197 (Alberta Q.B.)-charge of traffiking in big game or game birds by selling feathers. Case does not fully discuss characterization but indicated that effect must be given to the clear wording of the prohibition in the absence of statutory or regulatory permission.

(b) Strict Liability

R. v. Chapin [1979] 2 S.C.R. 121 (S.C.C.)-charge pursuant to s. 14(1) of Migratory Birds Convention Acts.

R. v. Congle (1981), 34 N.B.R. (2d) 334, (N.B.Q.B.)-charge of possessing firearm capable of holding more than three shells contrary to s. 43(1)(f) of Fish and Wild Fire Act. The relevant statute specifically designated absolute offences.

R. v. Cummins, [1979], 3 W.W.R. 593 (Sask. P.C.)-charge of unlawfully killing more game than permitted. This decision indicates that the major issue with respect to characterization is the effect upon enforcement.

R. v. Gonder (1981), 62 C.C.C. (2d) 326 (Y.T.T.C.)

-charge of interfering with game trap contrary to s. 28(1) of Game Ordinance.

R. v. Jones, [1981] S. D. 6190-01 (Sask. P.C.) -keeping wildlife in captivity without a license contrary to s. 5 of Wild Life Act.

R. v. Phillips and Phillips (1980), 33 N.B.R. (2d) 50 (N.B.Q.B.)-hunting game with light contrary to Game Act.

R. v. Scofield, [1981] O. D. C.C. 5282-01 (Ont. Dis. Ct.)-charge of hunting in a closed area.

R. v. Schryvers (1977-78), 2 W.C.B. 549 (Sask. D.C.)-killing a cow moose contrary to Game Act.

R. v. Slovack, [1980] 1 W.W.R. 368 (Alberta P.C.)-charge of killing game contrary to s. 4(a) of National Parks Game Regulations.

(c) Requiring Proof of Mens Rea

R. v. Brown and Ballman, [1982] A. D. 6185-01 (Alberta C.A.)-charge of hunting with bait contrary to s. 45(1)(b) of Wildlife Act. Presence of the words "set out, use or employ for the purpose of taking big game" envisaged deliberate acts requiring proof of mens rea.

4. Immigration Cases

(a) Absolute Liability

R. v. Malhotra (1980) 57 C.C.C. (2d) 539 (Man. P.C.)-charge of remaining in Canada without proper authority having ceased to be a visitor contrary to s. 95(K) of the Immigration Act. Factors examined were the scheme of the legislation which was viewed as one not dealing with public welfare or the individual conduct of Canadians.

(b) Strict Liability

R. v. Kwiatkowski, (1980-81), 5 W.C.B. 197 (Que. S.C.)-working without a valid employment visa contrary to s. 48 of the Immigration Act.

R. v. Singh, [1981] 6 W.W.R. 445 (Man. Co. Ct.)-charge of unlawfully returning to Canada contrary to s.s 57 and 96 of the Immigration Act.

(c) Requiring proof of Mens Rea

R. v. Roy (1981), 57 C.C.C. (2d) 286 (Ont. P.C.)-presence of word "knowingly" converted the offence into one requiring proof of mens rea.

5. Industrial Safety

(a) Absolute Liability

R. v. E.B. Eddy Forest Products Limited, [1980] O. D. C. C. 5855-01 (Ont. Dist. Ct.)-failing to ensure prescribed methods of operation carried out

contrary to Occupational Health and Safety Act. Factors examined were the overall regulatory pattern and the presence of the mandatory words "shall ensure".

R. v. Ornamental Precast Limited (1980-81), 5 W.C.B. 471 (Ont. P.C.) charge of failing to provide safety equipment contrary to s. 14(1)(a) of Ontario Health and Safety Act. Presence of word "ensure" indicated absolute liability notwithstanding heavy penalties.

R. v. Servico Ltd. (1977), 2 Alta. L.R. (2d) 388 (Alberta C.A.)-charge of permitting a person between the ages of 5 and 18 to work during the hours ou off2:01-6 a.m. contrary to s. 41 of the Alberta Labour Act. It should be noted that this case was decided prior to the case of R. v. Sault Ste. Marie.

(b) Strict Liability

R. v. Algoma Steel Corporation (1981-82), 6 W.C.B. 70 (Ont. P.C.)-breach of s. 14(1) of Occupational Health and Safety Act requiring employer to ensure safe job procedures and equipment.

R. v. Greenspoon Brothers Limited, [1980] O. D. C. C. 5080-01 (S.C. of Ontario)-charges pursuant to s. 14(3) of Construction Safety Act.

R. v. Industrial Fasteners Ltd. (1978-79), 3

W.C.B. 330 (Ont. Co. Ct.)-s. 24(1)(c) of Industrial Safety Act.

R. v. Lorlea Steels Ltd., [1980] O. D. C. C. 5195-02 (Ont. Co. Ct.)-charges were laid re unsafe working procedures, contrary to s.s 80 and 138(1) of Ontario Regulations pursuant to Construction Safety Act.

R. v. Quazar Petroleum Ltd. (1980), 19 A.R. 9 (Alberta Dist. Ct.)-charge of failing to provide respiratory equipment as required by Petroleum and Natural Gas Safety Regulations.

R. v. United Ceramics Ltd. (1979), 52 C.C.C. (2d) 19-charge of failing to ensure prescribed safety measures contrary to s. 34(1)(c) of Industrial Safety Act. It should also be noted however that a charge under s. 24(3) of the same Act (failure to take every precaution reasonable under the circumstances) was held to require proof of mens rea.

R. v. Z-H Paper Products Ltd. (1980), 107 D.L.R. (3d) 163 (Ont. Div. Ct.)-charge pursuant to s. 24(1) requiring that an employer "shall ensure" certain safety precautions was held to involve strict liability. Section 24(3) of the same Act however created a mens rea offence while s. 24(4) created an absolute liability offence.

6. Liquor Offences

(a) Absolute Liability

R. v. Capozzi Enterprises Ltd. (1981), 60 C.C.C. (2d) 385 (B.C.C.A.)-charge under s. 42 of Liquor Control Act making it an offence for anyone holding a license or his employee to permit any person apparently a minor to enter a licensed establishment except with lawful excuse. S. 82 of the Act deemed the occupant to be a party to the offence. It was held by the court to be an offence of absolute liability as regards the occupant.

(b) Strict Liability

R. v. Boardman (1980), 47 C.C.C. (2d) 334 (Ont. Co. Ct.)-charge of selling liquor to a person apparently under 19 contrary to s. 45 of Liquor License Act.

R. v. Central City Investments Ltd. (1980), 30 N.B.R. (2d) 365 (N.B.Q.B.)-charge of permitting minors into a beverage room contrary to s. 126(3) of Liquor Control Act. The court held that while the fines were not severe, the overall consequences to the owner could be, and therefore the offence was one of strict liability.

R. v. DaCosta (1979), 3 W.C.B. 330 (Ont. Div. Ct.)-selling liquor to an intoxicated person contrary to s. 49 of Liquor License Act.

R. v. Fedoruk (1980-81), 5 W.C.B. 167 (Ont. Dist. Ct.)-sale of liquor to minors contrary to s. 45(2) of Liquor License Act.

R. v. Marrandino (1980-81), 5 W.C.B. 493 (B.C. Co. Ct.)-sale of liquor to a minor by a person who was not an occupant.

R. v. Maurice [1980] O. D. C.C. 5735-02 (Ont. Dist. Ct.) allowing drunkenness on the premises. and allowing removal of liquor contrary to the regulations of the Liquor License Act. R. v. Riverview Arms (1980), 30 N.B.R. (2d) 384 (N.B.Q.B.)-permitting minors to enter licensed premises without lawful excuse.

R. v. Studer, [1980] S. D. 5735-01 (Sask. D.C.)-unlawfully selling liquor to minor contrary to Liquor Act.

7. Motor Vehicle Offences

(a) Absolute Liability

R. v. Allen (1980), 3 M.V.R. 203 (Ont. Co. Ct.)-operating a commercial motor vehicle with excess axle unit weight contrary to s. 72 Highway Traffic Act.

R. v. Canning (1980), 40 N.S.R. 177 (N.S. Co. Ct.)-speeding contrary to s. 96(1) of Motor Vehicle Act. Factor looked at was the

commandment-like language.

R. v. Greer (1980-81), 5 W.C.B. 440 (Ont. P.C.)-failing to stop at a red light contrary to s. 96(5) of Highway Traffic Act. It was held that s. 96(5)(a) set out the only exemption in respect of absolute liability.

R. v. Harper, [1978] 2 W.C.B. 549 (Sask. D.C.)-charge of speeding contrary to Vehicles Act. Court held that a effective and simple regulation is necessary to achieve intensive economic and efficient use of the road system.

R. v. Hipwell, [1981] B.C.D. C. C. 5787-01 (B.C. Prov. Ct.)-charge of speeding.

R. v. Walker (1980), 5 M.V.R. 114 (Ontario Co. Ct.)-charge of failing to stop for a stop sign contrary to s. 88(a) Highway Traffic Act.

(b) Strict Liability

R. v. Blackburn (1980), 57 C.C.C. (2d) 7 (B.C.C.A.) driving motor vehicle without valid insurance contrary to s. 18(2)(b) of Motor Vehicles Act. Factors considered were: (1) safety of the public was not affected by a breach of the provision; (2) relatively severe penalties; (3) unclear language.

R. v. Briand (1979), 32 N.S.R. (2d) 615 (N.S. Co. Ct.) -driving while suspended contrary to s.

258(2) of Motor Vehicle Act.

R. v. Higgins (1981), 46 N.S.R. (2d) 80 (N.S.C.A.)-charge of failing to obey a traffic sign contrary to s. 74(2) of Motor Vehicle Act. Primary indicators were the overall regulatory pattern, subject matter, penalty, the demerit system, and their view that the intent of the legislature to create an absolute liability offence was not clearly revealed.

R. v. Hon Gum (1980), 4 W.C.B. 147 (Ont. P.C.)-using defaced license plates contrary to s. 9(1)(b) Highway Traffic Act.

R. v. Hynd, [1979] S. D. 6140-01 (Sask. D.C.)-charge of failing to yield right-of-way contrary to s. 138(a) of the Vehicles Act.

R. v. Laidlaw Transport Limited (1980), 4 M.V.R. 253 (Ont. Co. Ct.)-charge of driving an excess weight vehicle. The court held that the overall regulatory pattern did not compel an interpretation in favour of absolute liability. They held that the penalty was of doubtful help, and further it was held that the word "shall" does not displace the presumption that an offence of a regulatory nature is one of strict liability.

R. v. MacDougall (1981), 60 C.C.C. (2d) 137 (N.S.C.A.)-charge of driving while suspended contrary to s. 258(2) Motor Vehicles Act. The

court looked at the regulatory pattern, subject matter of the offence, penalty, and position of the language. They held that it was not a traffic offence and therefore prima facie strict liability.

R. v. McGilvery (1979), 19 A.R. 447 (Alberta Dist. Ct.)-charge of permitting an uninsured motor vehicle on road contrary to s. 71(3)(a) and failing to do the duties of a driver at the scene of an accident contrary to s. 79(1) and s. 104(1) of Motor Vehicles Administration Act.

R. v. Parsons (1981), 11 M.V.R. 39 (N.S. Co. Ct.)-charge of speeding. It was held that this was an offence of strict liability but due diligence was not a defence because of a narrower statutory defence provided.

R. v. Prue and Baril (1980), 96 D.L.R. (3d) 577 (S.C.C.)-charge of driving while suspended contrary to s. 86(d) British Columbia Motor Vehicles Act.

R . v. G.M. Smith Ltd. (1981-82), 6 W.C.B. 160 (Ont. Co. Ct.)-charge of permitting an overweight vehicle on roadway.

R. v. Sutcliffe (1980-81), 8 M.V.R. 42 (B.C.S.C.)-charge of operating uninsured motor vehicle contrary to s. 18(2) Motor Vehicles Act. Suspension of license and severity of penalties

were considered to be major factors.

R. v. Wright (1980-81), 7 M.V.R. 315 (Ont. Div. Ct.)-charge of speeding.

8. Municipal Law

(a) Absolute Liability

R. v. Kelly Landscape Contractors Ltd. (1980), 30 M.P.L.R. 67 (Ont. Co. Ct.)-charge of using premises other than in conformity with zoning by-law. Court held that the Act aimed at maximum control as indicated by the usage of absolute terms.

(b) Strict Liability

R. v. Kaleidoscope Theatre Production Society, [1981] 5 W.C.B. 376 (B.C. Co. Ct.)-charge of opening hall contrary to fire regulations. The court held that there was nothing from the wording which would suggest that the the offence should be absolute.

9. Pollution Cases

(a) Absolute Liability

None reported since case of R. v. Sault Ste. Marie.

(b) Strict Liability

R. v. Aberdeen Paving Ltd. (1981), 45 N.S.R. 344 (N.S.C.A.)-charge of causing or permitting water pollution contrary to s. 16 of Water Act.

R. v. Dennison Mines Ltd. (1980-81), 5 W.C.B. 164-charge of discharging excessive affluent contrary to s. 69(2) of Ontario Water Resources Act.

R. v. Gulf of Georgia Towing Company Ltd., [1979] 3 W.W.R. 84 (B.C.C.A.)-charge of depositing oil in water frequented by fish contrary to s. 33(2) of Fisheries Act.

R. v. Irving Oil Company Ltd. (1981), 45 N.S.R. (2d) 438 (N.S. Co. Ct.)-charge of discharging waste without permit contrary to s. 23(1) of Environmental Protection Act.

R. v. North Arm Transportation Company Ltd. (1979), 3 W.C.B. 365 (B.C. Co. Ct.)-charge of permitting deposit of a deleterious substance.

R. v. Pioneer Timber Company Ltd., (1979) 3 W.C.B. 211 (B.C. Co. Ct.)-charge of depositing sediment in river frequented by fish contrary to s. 32(2) of Fisheries Act.

R. v. Spataro Cheese Products Limited (1981-82), 6 W.C.B. 66 (Ont. P.C.)-charge of unlawfully discharging waste into creek contrary to Ontario Water Resources Act.

R v. Panarctic Oils Limited (1983), 44 A.R. 385-a charge of dumping oil contrary to Ocean Dumping Control Act.

(c) Requiring Proof of Mens Rea

R. v. McIntyre Mines Ltd. (1978), 5 Alta. L.R. (2d) 201-charge of knowingly putting or permitting debris to be put in water frequented by fish, contrary to s. 33(3) of Fisheries Act. Word "knowingly" or "permit" indicate a requirement for proof of mens rea.

10. Taxation Cases

(a) Absolute Liability

R. v. Gourley (1980), 4 W.C.B. 129 (N.S. Co. Ct.)-charge of improper use of marked gasoline contrary to Gasoline and Diesel Oil Tax Act. Factors looked at were that the statute was a tax statute and not a public welfare statute and the language of the statute was couched in mandatory terms.

(b) Strict Liability

R. v. Rohan's Rockpile Ltd. and Lowther (1981), 57 C.C.C. (2d) 388 (B.C.C.A.)-charge under ss.s 153(1) and 238(2) of Income Tax Act, having failed to remit monies withheld from wages.The court held it to be a strict liability offence looking at the

severity of the penalty, absence of language making it absolute and finding that it was an offence of omission rather than comission.

R. v. Bordignon (1980-81), 5 W.C.B. 469 (B.C. Co. Ct.) charge of failing to remit monies withheld from wages.

R. v. Highland Enterprises Ltd. (1981) 30 Nfld. & P.E.I.R. 515 (P.E.I.S.C.)-charge of failing to file an income tax return contrary to s. 238(2). The words "within reasonable time" were held to import a requirement of some element of fault.

R. v. John and Murray Motors Ltd. (1980-81), 5 W.C.B 1 (B.C. Co. Ct.)-charge of failing to file return contrary to s. 150(2) of the Income Tax Act.

R. v. Merkle (1980), 1 W.W.R. 361 (Alberta C.A.) -charge of failing to file tax return within reasonable time from demand contrary to s. 150(2) of the Income Tax Act. The word "reasonable" was held to suggest some elasticity.

R. v. O'Dare (1979), 3 W.W.R. 284 (B.C. Co. Ct.) -charge of failure to remit income tax withheld from wages.

R. v. Rogo Farming Limited (1981), 56 C.C.C. (2d) 31 (Ontario P.C.)-charge of failing to remit tax withheld from wages. Factor looked at was the

substantial penalties.

R. v. Schewchuk (1980-81), 5 W.C.B. 368 (Ont. P.C.)-charge of failing to remit sales tax contrary to Retail Sales Tax Act.

(c) Requiring Proof of Mens Rea

R. v. Hefler (1981), 42 N.S.R. (2d) 276 (N.S. Co. Ct.)-charge of willfully evading income tax contrary to s. 239(1)(d) of the Income Tax Act.

R. v. Lee (1980-81), 5 W.C.B. 153 (B.C. Co. Ct.)-charge of filing false tax returns contrary to s. 239(1)(a) of the Income Tax Act and one count of tax evasion contrary to section 239(1)(d).

11. Miscellaneous

(a) Absolute Liability

R. v. Newfoundland Broadcasting Company Ltd. (1981), 30 Nfld. and P.E.I.R. 68 (Nfld. P.C.) -charge of broadcasting partisan message on day of election contrary to s. 28(1) of Elections Act. Held that it was absolute liability as it was easy to be aware of the regulation!

(b) Strict Liability

R. v. Robertson, (1980-81), 5 W.C.B. 372 (B.C. Co. Ct.) -charge of nondisclosure under Public

Officials and Employees Disclosure Act.

R. v. Sidney Freight Ltd. (1980-81), 5 W.C.B. 381 (B.C. Co. Ct.)-failure to notify manager of a ship of carriage of dangerous goods. The court held that this was a matter of public safety and was not a crime "in the true sense".

Strasser v. Roberge (1980), 103 D.L.R. (3d) 193 (S.C.C.)-participating in an unlawful strike.

APPENDIX B

DEFENCES OF GENERAL APPLICATION

1. Involuntary Action (Accident)

Report, p. 57.

(a) Held to be an available defence (1981),

R. v. Irving Oil Company Ltd. 45 N.S.R. (2d) 438-the trial judge had found that the discharge of oil was accidental and that the accused had exercised reasonable care.

R. v. Parsons (1981), 11 M.V.R. 39-on a charge of speeding the court indicated that the accused's evidence may give rise to the defence of involuntary action as what had occurred had happened without any fault of the part of the accused and as a result of extraneous factors beyond his control.

(b) Held not to be an available defence

R. v. Hipwell, [1981] B.C.D. C. C. 5787-01-held the fact that the excessive speed was caused by an engine malfunction was no defence to the charge.

2. De minimis non curat lex (the law does not deal with trifles)

Report, p. 81.

(a) Held to be a possible defence

R. v. Richmond Plywood Corporation Ltd., [1981] B.C.D. C. C. 5490-05-B.C. Co. Ct. found that it was unnecessary to determine whether this was an appropriate case for the application of the principle of deminimis non curat lex having been able to reach a decision for acquittal on another ground.

R. v. Webster 10 M.V.R. 310-the charge was one of unlawfully parking in a prohibited parking area. The intent of the by-law was to facilitate snow removal from the street during the prohibited area. When the accused parked there was no snow on the ground and there was a special event under way during which he parked in the area for three hours. District Court Judge Vannini held that where there are irregularities of very slight consequence the principle would apply.

3. Impossibility.

Report, p. 79.

(a) Held to be an available defence

R. v.Allen (1981), 59 C.C.C. (2d) 563-The Ont. Dist. Ct. held that the defence of commercial impossibility if it exists, was not made out.

R. v. Chapin (1979) 45 C.C.C. (2d) 333-Discussed

in the context of a defence of due diligence.

R. v. Pioneer Timber Company, [1979] B.C.D. C. C. 5490-06-Again, not fully discussed, but the defence raised was "act of God" as being the cause of the pollution. The County Court judgment indicated that the evidence did not support the defence.

R. v. Royka [1979] 3 W.C.B. 161-Defence of impossibility of compliance available in Canada, although not made out upon the evidence in this case.

4. Mistake of fact

Report, p. 61.

(a) Held to be a possible defence

R. v. Richardson (1981), 62 C.C.C. (2d) 417-Defence available although not made out. Defence was categorized as one of strict liability.

R. v. Cummins, [1979] 3 W.W.R. 593-Charge of shooting more game than permitted. Defence accepted that the accused thought he had not in fact killed the first deer.

R. v. Servico (1977), 2 Alta. L.R. (2d) 388-On a charge of employing an underage employee during prohibited hours, belief that the employee was 18

years of age and not 16 was held to be a defence.

R. v. Briand 32 N.S.R. (2d) 615.-On a charge of driving while licence suspended. N.S. Co. Ct. held that honest belief that license not suspended could be a defence.

R. v. Denison Mines Ltd., [1980] O. D.C.C. 6157-02-On a charge under the Ontario Water Resources Act, the Ont. D.C. held that both the employer and employee were operating under reasonable mistake of facts, and given that belief had exercised due diligence.

R. Dowler, [1980] B.C. D.C.C. 6167-02-On a charge under the Pacific Fishery Regulation and Licensing Act, B.C. Co. Ct. held that a belief that packing tabs were not required until later in the year was a mistake of law and not of fact. The latter would be a defence.

R. v. Kaleidoscope Theatre Production Society, [1981] B.C. D.C.C. 5790-01-Accused was charged with opening a hall contrary to Fire Services Regulations. The accused had received a permit for an initial performance. The accused was given the impression that a permit would be automatically forthcoming for future performances under like conditions, and proceeded without a permit. This was held by B.C. Co. Ct. to be a reasonable mistake of fact and a defence.

R. v. Lace (1981), 45 N.S.R. (2d) 466-held that for mistake of fact to be a defence it must be a reasonable mistake.

R. v. Nussbaumer, [1981] B.C.D. C. C. 5725-01-Court again held that in order to succeed the accused must reasonably believe in a mistaken set of facts which, if true, would render her admission innocent.

R. v. Prue and Baril (1980), 96 D.L.R. (3d) 577-The S.C. of Canada held that the existence of a motor vehicle suspension is a question of fact whether or not the provincial legislation which suspends the license operates automatically or requires notice or some other action. Ignorance of the fact of the suspension is therefore a defence.

R. v. Richmond Plywood Corporation Ltd., [1981] B.C.D. C. C. 5490-05-Argument that the respondent honestly believes that it had the right to develop its land as it chose, within the parameters of the industrial zoning which appliled; and that it had received no notification that the low portion of its land was considered by the authorities to be a fish habitat; and that it had no reason in the circumstances to suspect that the marsh was a fish habitat was held to found a defence.

R. v. Rohan's Rock Pile Ltd. 57 C.C.C. (2d)

388-Defence of honest and reasonable belief in a mistaken set of facts held to be available.

R. v. Studer, [1980] S.D. 5735-01.
Sask. D.C. held that reasonable mistake of fact may be an available defence where charge is one of strict liability.

R. v. McGilvery (1980) 19 A.R. 447-On a charge of driving without insurance the Alta. D.C. held that reasonable belief in a mistaken set of facts which, if true, would render the Act or omission innocent, is a defence.

(b) Held not to be a defence

R. v. Burjoski, [1979] B.C.D. C. C. 6065-02.-Discussed in the context of the due diligence defence, but held not to be available where the offence was one of absolute liability.

R. v. Morrison (1979), 31 N.S.R. (2d) 195.
-Reasonable mistake of fact accepted by trial judge, but court of appeal held the defence one of absolute liability and therefore no defence.

5. Mistake of Law

Report, p. 64.

(a) Held to be available defence

R. v. Hefler (1981), 42 N.S.R. (2d) 276-On a charge of wilfully evading income tax, the N.S.

Co. Ct. held that ignorance of the law is a defence where fraudulent intent is required to be proven.

Molis v. R. (1981), 55 C.C.C. (2d) 558-Supreme Court of Canada defined the limits of such defence by indicating that there is no difference between mistake of law and ignorance of the law and that it is not a defence providing that the regulations are made within the purview of statutory powers and are publicized according to existing law.

(a) Held not to be available defence

R. v. Molis (supra).

R. v. Cunningham (1979), 45 C.C.C. (2d) 544-Accused misread speed limit on sign. That was held to be a mistake of law and not an available defence.

R. v. Dowler, [1980] B.C.D. Crim Conv. 5490-04.-The respondent's mistake in not knowing that he was required to display his validation tabs is a mistake of law and not an available defence.

R. v. Richardson (1982), 62 C.C.C. (2d) 417-Accused thought that he was a prospector within the meaning of the Securities Act of Ontario. The court held that this was a mistake of law, and although it was a reasonably held

belief, it was not an available defence.

6. Necessity

Report, p. 74.

(a) Defence held to be available

R. v. Greer (1980-81), 5 W.C.B. 440.-Ont. Prov. Ct. held that necessity of an extremely compelling nature could be a defence to a charge of proceeding through a stop light.

R. v. Walker (1980) 5 M.V.R. 114.-Ont. Co. Ct. held that defence was available on a charge of failing to stop at a stop sign, but a sufficient evidentiary basis had not been made out.

R. v. Slovack, [1980] W.W.R. 368.-On a charge of killing a bear in a national park, Alta. Prov. Ct. held defence of necessity to be available because it was an offence of strict liability.

R. v. Royka (1978-79), 3 W.C.B. 161.-Ont. Co. Ct. held that the defence was available on a charge of retaining undersized fish, but defence not made out on the facts.

7. Obedience to authority

Report, p. 83.

(a) Held to be an available defence-in the sense of two sets of conflicting legislation both of which cannot be complied with at the same time.

Kokoliades v. Kennedy (1911), 18 C.C.C. 495-A person complying with a statute which is later ruled ultra vires is not guilty of an offence under another statute which prohibits the conduct.

Kennedy v. Couillard (1910), 17 C.C.C. 239-held that a person complying with a law which is unconstitutional, cannot be guilty of an offence under another statute, even if the first is ruled null and void.

R. v. Campbell Mlynarchuk (1972), 10 C.C.C. (2d) 26-In reliance upon a decision of the Supreme Court of Alberta, accused danced totally nude. She was charged with taking part in an immoral performance after the decision was reversed by the Court of Appeal. Alta. D.C. held that her mistake was one of law and not a defence.

R. v. Daylight Theatre Company, [1973] 6 W.W.R. 325.- Sask. C.A. held that is case of conflict between two statutes, no liability would arise. Here there was no conflict between federal obscenity laws and provincial censorship laws.

(b) Held to be a possible defence-in the sense of being misled by a person in authority.

R. v. Fleming (1981), 43 N.S.R. (2d) 249. On a charge of driving while disqualified, the N.S. Co. Ct. held that the defence applied where accused, who knew his licence had been revoked, had been told by an official that he did not need his licence to steer a vehicle that was being towed.

R. v. MacDougall (1983), 1 C.C.C. (3d) 65-On a charge of driving while license suspended, Supreme Court of Canada held that officially induced error may be a defence, but not on the facts of this case.

8. Self defence

(a) Held to be a defence.

R. v. Slovack (1980), W.W.R. 368-the accused shot a bear in a national part. Self-defence was held by Alta. Prov. Ct. to be an available defence.

POOR

QUALITY

ORIGINAL